(2) Supreme Court, U.S.
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No. 04-63

IN THE

Supreme Court of the United States

DAVID B. CORNEAL AND SANDRA Y. CORNEAL,
Petitioners

v.

JACKSON TOWNSHIP, HUNTINGDON COUNTY, PENNSYLVANIA, ET AL.,
Respondents

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case raises the important and recurring question of the uncertain character of the standard of official conduct required to establish a substantive due process violation in cases involving property rights, and the respective roles of the judge and jury in determining such claims. In a case involving unhurried official conduct, the District Court acknowledged the unlawfulness of a moratorium, and a jury question as to whether that and other related actions were motivated by personal animus towards the property owner. The District Court and the Third Circuit invoked *County of Sacramento v. Lewis* to hold that the officials were entitled to summary judgment because Petitioners had not established that the conduct was solely motivated by personal animus and "*completely unrelated in any way* to a rational land use goal" and thus could not satisfy the shocks the conscious standard of conduct. The questions presented for review are:

1. Whether in a property rights case involving unhurried official conduct already found to raise a jury a question as to improper motive, the legal standard of conduct necessary to establish a substantive due process violation requires a property owner to establish that the officials' conduct was solely motivated by an intent to harm and completely unrelated in any way to a rational land use goal?

2. Whether it is the province of the jury to decide whether the officials' asserted land use goal is legitimate; if there exists a legitimate goal, whether the challenged official conduct advanced that goal or was a pretext to justify that conduct; and whether the challenged conduct, in fact, shocks the contemporary conscience?

PARTIES TO PROCEEDING

The Petitioners are David B. and Sandra Y. Corneal, husband and wife, Plaintiffs in the District Court.

The Respondents are:

Jackson Township, Huntingdon County, Pennsylvania;

W. Thomas Wilson, individually and in his official capacity as a Supervisor of Jackson Township;

Michael Yoder, individually and in his official capacity as a Supervisor of Jackson Township;

Ralph Weiler, individually and in his official capacity as a Supervisor of Jackson Township;

Barry Parks, individually and in his official capacity as the Sewage Enforcement Officer of Jackson Township;

David Van Dommelen, individually and in his official capacity as the Building Permit Officer of Jackson Township;

Ann L. Wirth, individually and in her official capacity as Secretary of Jackson Township; and

Larry Newton, individually and in his official capacity as Solicitor to Jackson Township.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a) is unpublished, but available at 94 Fed. Appx. 76, 2004 U.S. App. LEXIS 7198 (3d Cir. Apr. 13, 2004). The opinion of the District Court (App. 5a) granting summary judgment is reported at 313 F. Supp. 2d 457 (M.D. Pa. 2003). The previous opinion of the District Court denying summary judgment (App. 37a) is unpublished.

JURISDICTIONAL STATEMENT

The Court of Appeals entered its judgment on April 13, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The 14th Amendment to the United States Constitution provides in relevant part:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law.

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This case presents questions of far-reaching practical importance to the Fourteenth Amendment's substantive due process protection of rights in private property. In this particular case, the trial judge acknowledged: (1) a jury question as to the Respondent officials' improper motivation, including personal animus towards the Petitioners; (2) the unlawfulness of a subdivision moratorium hastily and illegally enacted; and (3) a host of other adverse actions taken towards Petitioners. The trial judge, apparently relying on previously undisclosed hearsay letters from one citizen produced for the first time in summary judgment proceedings, held that Respondents at most were acting with mixed motives, thus they had a rational land use goal and Petitioners had failed to demonstrate that the Respondents' actions were "completely unrelated in any way to [that] rational land use goal." Therefore, the District Court held, Petitioners as a matter of law could not establish that the Respondents' conduct shocked the conscience, the necessary prerequisite for a violation of substantive due process rights. (App. 18a-22a, 24a-27a). The Third Circuit upheld the District Court with little analysis other than to agree with the stated standard of conduct.

This approach is a departure from the standard of conduct set forth in this Court's substantive due process jurisprudence, and prevents the jury from considering evidence that the totality of the official acts under the circumstances were so egregious as to constitute arbitrary and irrational conduct in the constitutional sense, and from considering disputed evidence that the goal itself was a pretext to justify the actions towards the property owner, and that the official was not acting in pursuit of the stated goal.

A. Background

Petitioners brought an action to seek redress for official conduct by Respondents, which, Petitioners contend, was so egregious as to be arbitrary and irrational in the constitutional sense. Admissions, undisputed evidence, and stipulations for trial showed that Respondents took a series of actions that continually obstructed the Petitioners' right to build a home on their property because Respondents did not want "trouble-making yuppie[s] from over the mountain," settling into their rural community. The Respondents defended that all of their actions arose out of concern for controlling the growth of residential land development in their Township, while Petitioners pointed to evidence that the stated concern was contrived as an excuse to justify the Respondents' obstruction of their property rights, and that the challenged actions did not further the stated goal.

On initial cross-motions for summary judgment,[1] Petitioners relied on admissions and undisputed evidence that included:

- There had been no acceleration in requests for building permits and the requests had remained stable for the previous ten years, at about 37 per year, for all structures, including garages and other outbuildings (R. A734, A904, A1049, A1071);

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[1] The summary judgment motions involved all Respondents with the exception of Respondent Newton, who had been dismissed from the case on a motion pursuant to Rule 12(b)(6). Although the Petitioners appealed that dismissal to the Third Circuit, the propriety of the District Court's actions with regard to Respondent Newton's dismissal is not before this Court because the Third Circuit never decided those issues, deeming them moot in light of its holding with regard to the Petitioners' substantive due process claims.

- One Respondent's personal interest in the property (R. A634-35);
- The absence of a subdivision ordinance, and the imposition of a hastily enacted and illegal building moratorium on subdivisions, assertedly out of concern over controlling an increase in building and development (App. 7a);
- The refusal of the Respondent building permit officer, at the instruction of the Respondent supervisor with the personal interest in the property, to give Petitioners even an *application* to apply for a building permit for anything, even outbuildings that did not require subdivision approval or septic, because Respondents considered husband Petitioner a "trouble-making yuppie from over the mountain" (R. A704-06, A710, A1068, A1065, A709);
- Respondents' refusal to *review* the Petitioners' building submissions (R. A592, A711-12);
- A wetlands violations report made by the Respondent supervisor with the personal interest in the property determined to be meritless (R. A660-61);
- The Respondents' demand for compliance with requirements in the absence of related ordinances or regulations (App. 7a);
- Respondents' insistence that where one residence existed on Petitioners' 95-acre tract of land, building just one additional residence would constitute a subdivision forbidden by the illegally imposed moratorium (R. A499);
- Informing the attorney for a third party that had contracted to buy the existing dwelling and a portion of the 95 acres, that the

Respondents would not grant the necessary approvals, thereby causing the third party to abandon the contract (R. A761, A919, A1074); and

- The filing of an injunctive action to prevent Petitioners from building one additional residence on their property (R. A1074).

In addition to these admission and undisputed facts, there was disputed evidence about the extent of the interested Respondent's interest in the Petitioners' property, and whether providing the information that led the third party to abandon the contract to purchase the existing dwelling and a portion of the tract was intended to cause that result.[2]

The District Court initially held that this array of evidence raised a disputed fact as to whether Respondents' actions were motivated by improper personal animus against Petitioners, rather than a rational land use goal, denied summary judgment on the substantive due process claim, and scheduled the case for trial. (App. 50a-51a). At the time, Third Circuit jurisprudence held that substantive due process plaintiffs asserting property deprivations had to show that the government's actions were "motivated by bias, bad faith, or improper motive, such as partisan political reasons or personal reasons unrelated to the merits of the plaintiffs' application." *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988); *Midnight Sessions, Ltd. v. Philadelphia*, 945 F. 2d 667, 683 (3d Cir. 199).

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[2] The District Court and the Third Circuit concluded that Petitioners' evidence was insufficient to establish the state law tort of intentional interference with contractual relations. Notwithstanding the grant of summary judgment on Petitioners' intentional interference claim, the evidence produced in support of that claim still serves as evidence of the Respondents' concerted efforts to deprive the Petitioners of their property rights.

Shortly before the scheduled trial, the Respondents brought to the District Court's attention the then-recently issued opinion in *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003), in which the Third Circuit overruled its own *Bello v. Walker* and its progeny insofar as those decisions had held that a plaintiff may establish a substantive due process violation in the context of land use cases by showing that official conduct was the result of improper motives. The *United Artists* Court held that in the wake of this Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), plaintiffs in such cases may make the required showing only if they demonstrate that the official conduct shocks the conscience, and remanded the case for a determination as to whether the plaintiff could survive summary judgment under that standard. *United Artists*, 316 F.3d at 402. In doing so, the *United Artists* Court acknowledged that the meaning of the shocks the conscience standard varies depending on the factual context. *Id.* at 400.

In light of *United Artists*, the District Court invited a renewed motion for summary judgment from Respondents in this case. (App. 34a-36a). In connection with the renewed motion, the Respondents relied on the same summary judgment evidence as was submitted in the original summary judgment proceedings, except that Respondents for the first time submitted hearsay letters from a citizen, one of which post-dated the moratorium and which were not previously identified, purportedly suggesting community concern over controlling development in the township, which Respondents urged provided a basis for the moratorium. (R. A1146-48; Supp. R. at 1).

The District Court acknowledged the illegality of the moratorium at this juncture as well as the jury question concerning improper motive. The District Court granted the

Respondents' renewed motion for summary judgment, however, reasoning that the standard enunciated in *Sacramento v. Lewis*, and adopted by the Third Circuit in *United Artists* for cases involving deprivation of property, compelled the conclusion that as a matter of law, the Petitioners could not prevail on their substantive due process claim because, although the evidence suggested mixed motives for the Respondents' actions, one legitimate and the other illegitimate, they had not produced evidence sufficient to show that the Respondents actions were "completely unrelated in any way to a rational land use goal." The Court further held that all of the remaining state law claims failed because their claim under Section 1983 failed. (App. 18a). Specifically, the District Court held that:

> [T]o survive summary judgment under the "shocks the conscience" test ... the Corneals must have adduced evidence from which a reasonable jury could conclude that the Board's actions did not serve any rational land use purpose. As a result, unless the evidence indicates that the challenged decision is completely unrelated in any way to a rational land use goal, there is no violation of substantive due process.
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> ***
>
> [T]he Court finds that the totality of the facts, when viewed in the light most favorable to the Corneals, establishes that the Board may have acted with mixed motives; one related to a legitimate land regulation purpose (preserving land development status quo during the final approval process of the subdivision ordinance), the other related to illegitimate personal animus.
>
> ***

> As a result, the plaintiff must demonstrate that the land use decision or regulation was so totally irrational that it could not possibly be the real reason for the locality's action or, alternatively, that the locality applied its decision selectively so that its land use concern could not have been legitimate despite the rational basis for it.

(App. 18a, 22a, 24a).

The Petitioners timely appealed to the Third Circuit the grant of summary judgment as well as the Orders granting Respondent Newton's motion to dismiss and denying the Petitioners' motions for reconsideration and request for leave to amend the Complaint. On appeal, Petitioners argued that a jury should have been permitted to decide whether the stated concern was legitimate or a pretext for the Respondents' actions, and whether, in the context at issue, the totality of the Respondents' actions shocked the conscience. Petitioners argued that in contrast to the police in *Sacramento v. Lewis*, these Respondents had time to make unhurried judgments, and that a reasonable jury could have found that the improper motives led to actions taken with intent to harm or deliberate indifference, and made an ultimate determination that the overall actions taken were conscience shocking. Petitioners further argued that *Sacramento v. Lewis* did not hold that a substantive due process plaintiff outside the context of a police chase must establish the complete absence of any relation whatsoever to a legitimate governmental goal.

The Third Circuit, however, affirmed the judgment of the District Court and adopted, without elaboration or discussion, its conclusion that "unless the defendants' actions were 'completely unrelated in any way to a rational land use goal,' there is no violation." The Third Circuit found that

although the evidence may have shown personal animus, "under *United Artists*, mere improper motives are not conscience shocking." (App. 3a). (citing *Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)). The Third Circuit also relied on two decisions from the Eighth Circuit, both of which predated *Sacramento v. Lewis*.

The Third Circuit has created a standard that requires a substantive due process plaintiff to establish at summary judgment that the official conduct was solely motivated by an intent to harm, and that the actions were completely unrelated to a stated land use goal. It also removed from the jury the disputed questions of fact tying the challenged actions to an asserted rational goal, and the ultimate question of whether the conduct shocked the conscience. This ruling and the rulings of other Circuits around the country, leave in disarray and conflict the contours of the shocks the conscience standard as well as the role of the judge and jury in addressing the evidence in substantive due process cases involving real property.

REASONS FOR GRANTING THE WRIT

This case presents two recurring questions of great constitutional importance: what is the standard of conduct required to establish a substantive due process violation by an unhurried land use official against a property owner; and what are the roles of the judge and jury in determining the various issues that must be decided in order to make the ultimate determination of whether the official conduct violates substantive due process rights. In *Sacramento v. Lewis*, this Court held that the actions of a police officer in a high speed chase that resulted in the death of a suspect cannot give rise to a substantive due process violation unless the conduct "shocks the conscience," which, in turn, requires a showing of intent to harm the suspect physically or to worsen

his legal plight. *Sacramento v. Lewis*, 523 U.S. at 846, 853-54. In defining the contours of the shocks the conscience standard of conduct, this Court was careful to distinguish situations in which officials have the luxury of time to make unhurried judgments largely uncomplicated by the demands of competing obligations, and emphasized that in such circumstances deliberate indifference, as opposed to intent to harm, could shock the conscience. *Id.* at 852-53. Despite this, there exists a growing trend among the courts of appeals to fail to distinguish between situations involving time for reflection and those involving the need for instant judgments. The Third Circuit's decision cannot be reconciled with the reasoning and pronouncements of *Sacramento v. Lewis* and earlier decisions of this Court concerning the standard of conduct required to establish violations of substantive due process rights. Furthermore, the Circuits have developed an array of "substandards" to define exactly what is required for the conduct of a land use official to shock the conscience in exercising power over the property owners' property rights.

Moreover, in deciding substantive due process land use cases, the decisions below and of the other Circuit Courts reveal an approach to making threshold factual and legal determinations, necessary to reach the question of whether official conduct violates substantive due process rights, that conflicts with this Court's jurisprudence. The District Courts and the Courts of Appeals are greatly in need of guidance to create a uniform approach to the questions of whether it is the province of the judge or the jury to decide whether a legitimate land use goal exists, in cases where there is evidence suggesting otherwise; whether the actions taken furthered any legitimate goal; whether the stated goal is merely a pretext for imposing unfavorable and arbitrary requirements upon a property owner; and whether, taken as a whole, the conduct at issue rises to the level of arbitrary and

irrational conduct in violation of substantive due process rights.

This Court should grant a writ of certiorari because the decision of the Third Circuit and other circuits directly conflict with the decisions of this Court. Further, these decisions reveal conflict and disarray among the Circuit Courts as to the character of the standard of conduct required to establish a violation of substantive due process in cases involving deprivation of property rights and unhurried official conduct, including whether the facts must be evaluated by the jury. These issues implicate important and recurring questions of federal constitutional law, and this Court has not previously provided guidance in this precise area of substantive due process jurisprudence.

A. The Decision Below Conflicts With This Court's Rulings.

It is now beyond dispute that the Fourteenth Amendment guarantees more than the rights preserved by specific constitutional provisions, and includes protection of certain substantive rights, "barring certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986), *cited in Sacramento v. Lewis*, 523 U.S. at 840. The District Court below concluded that Petitioners had a constitutionally protected substantive due process right to use and enjoy their property, free of arbitrary and irrational government interference. (App. 17a). The Respondents below did not challenge that determination, and the Third Circuit accepted it as well. Thus, Petitioners have asserted a property right entitled to substantive due process protection, a violation of which is properly challenged under 42 U.S.C. § 1983. *See, e.g., Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (substantive due process violations are actionable

under § 1983), *cited in Sacramento v. Lewis*, 523 U.S. at 840; *see also DeBlasio v. Zoning Bd. Of Adjustment for the Township of W. Amwell*, 53 F.3d 592, 600-01 (3d Cir. 1995), *overruled on other grounds by United Artists*, 316 F.3d 392 (3d Cir. 2003).

This Court has explained that since the time of early explanations of due process, it has understood the core of the concept to be protection against arbitrary action. *Sacramento v. Lewis* at 845. "[T]he touchstone of due process is protection of the individual against arbitrary action of government," *id.* (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)), preventing government officials from abusing their power, or employing it as an instrument of oppression. *Collins v. Harker Heights*, 503 U.S. 115, 126 (1992) (internal quotations omitted), *quoted in Sacramento v. Lewis*, 523 U.S. at 846.

With these principles as a foundation, in *Sacramento v. Lewis*, this Court considered the appropriate standard of culpability for evaluating executive conduct in lawsuits asserting substantive due process violations. Although the Court's analysis in *Sacramento v. Lewis* was limited to the question of culpability of a law enforcement officer in the context of a high-speed vehicle chase, *Sacramento v. Lewis* at 839, the Court provided useful guidance regarding the appropriate standard in all substantive due process claims. The Court reiterated that only executive abuse of power that shocks the conscience meets the standard, and acknowledged that "[w]hile the measure of what is conscience-shocking is no calibrated yard stick, it does, as Judge Friendly put it, 'point the way.'" *Id.* at 846-47 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)). The Court noted that the two ends of the spectrum of conduct, negligence and intent to injure, are neither absolute nor exclusive definitions of what is, and what is not, conscience-shocking; the range of

conduct between these two points "is a matter for closer calls." *Id.* As the Court stated:

> Rules of due process are not [...] subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking. What we have said of due process in the procedural sense is just as true here: The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

Sacramento v. Lewis at 850 (quoting *Betts v. Brady*, 316 U.S. 455, 462 (1942)).

Thus, this Court defined the contours of the shocks of the conscience standard for executive conduct in substantive due process cases, involving death, personal injury or bodily invasion. The Court has not, however, provided crucial guidance on the application of the shocks the conscience standard to cases involving executive conduct concerning property rights. Although the Court has considered land use

cases in the context of equal protection, *see, e.g., City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003), and of takings, *see, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), it has not defined the contours of the standard of conduct in the circumstances of local land development and planning that could be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *See Sacramento v. Lewis* at 847 n.8.[3]

In approving the District Court's adaptation of *Sacramento v. Lewis* to the conduct of land use officials, the Third Circuit failed completely to make the distinction between hurried and unhurried conduct. The Third Circuit also ignored this Court's clear indication that *Sacramento v. Lewis*' intent to harm requirement was directed specifically to police chases. Moreover, the Third Circuit set down even more stringent requirements, defining a rigid and absolute test that would require a showing that the challenged conduct was *solely* motivated by an intent to harm and *completely* unrelated in any way to a stated rational land use goal. This approach would have district courts decide as a matter of law that conduct does not shock the conscience despite the presence of outrageous and even illegal conduct taken with personal animus towards the property owner, as long as the governmental actor asserts that the challenged conduct was related in any tangential and tenuous way to an asserted land use goal. This standard eviscerates the protections of the due process clause against governmental officials who would "abuse [their] power, or employ [it] as an instrument of oppression." *Sacramento v. Lewis*, 523 U.S. at 846 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 126 (1992)). Under that standard, a government officer may exhibit egregious

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[3] Petitioners' discussion of the proper role of the judge and jury in determining whether a stated governmental goal is legitimate as opposed to a pretext for abusive conduct, is reserved for Section C, below.

and outrageous conduct that nevertheless would not shock the contemporary conscience. *Sacramento v. Lewis* at 847 n.8. This can not be reconciled with this Court's reasoning and pronouncements in defining a minimum standard of conduct required to establish a substantive due process violation in police chase cases.

The Third Circuit repudiated this Court's direction in *Sacramento v. Lewis* that the phrase due process of law formulates a concept that is less rigid and more fluid, and requires consideration of official conduct on a case by case basis, an exact analysis of circumstances for the purpose of preserving the constitutional proportions of substantive due process. *Sacramento v. Lewis*, 523 U.S. at 850. It also ignored this Court's instruction that an asserted denial is to be tested by an appraisal of the "totality of facts in a given case." *Id.* (quoting *Betts v. Brady*, 316 U.S. at 462). The Third Circuit also repudiated this Court's guidance that official conduct must be measured by a sliding scale that takes into account the circumstances of the case.

This Court has noted that "deliberate indifference" may be conscience shocking where the state actor has the luxury of time to consider his actions, such as in the context of a custodial prison situation, but may not be conscience shocking in exigent or emergent circumstances where the state actor is making decisions in haste and under pressure, such as in the context of a prison riot or, in the case presented in *Sacramento v. Lewis*, a high-speed police chase. *Id.* at 852. Therefore, in the context of a rapidly evolving situation in which the state actor has no time for deliberation or reflection, such as a high-speed car chase, only a purpose to cause physical harm or to worsen the plaintiff's legal plight could give rise to liability under the Fourteenth Amendment. *Id.* at 854. The Third Circuit apparently heeded only the language of *Sacramento v. Lewis* concerning "purpose to

cause harm unrelated to the legitimate object of arrest," *Sacramento v. Lewis*, 523 U.S. at 836, language that was specifically targeted to police chases.

Sacramento v. Lewis does not counsel that the standard to be applied to a high-speed police chase would apply equally in the context of municipal land use decisionmaking. Indeed, the Court specifically refrained from concluding that, even in an emergency situation, only an intent to harm could "shock the conscience." *Id.* at 852. In any event, the district courts will almost never be presented with a situation in which local officials are making decisions under pressure and without time for reflection in cases involving property rights. Thus, property cases are more properly analogized to the custodial detention cases in which the Court has found that "deliberate indifference" to the rights of the plaintiffs will shock the conscience. *See Sacramento v. Lewis* at 849-850, 851 ("markedly different circumstances of normal pretrial custody and high-speed law enforcement chases shows why the deliberate indifference that shocks in the one case is less egregious in the other.")

The decision of the Third Circuit and others reflects the growing trend among federal courts to resist hearing any cases that may be categorized, however tangentially, as "land use disputes." The stock phrase intoned by the federal courts, pressed into service in this case, is that they "do not want to be sitting as federal zoning courts of appeals." The Third Circuit and District Court below effectively reduced this Court's jurisprudence on the shocks the conscience standard to a tool to justify the refusal of the federal courts to entertain claims concerning the actions of local government towards property owners, no matter how egregious, arbitrary and unlawful was the conduct of the local government actors, and tenuous a relation the stated land use goal. As Judge Cowen,

however, noted in his dissent to the Third Circuit's opinion in *United Artists*:

> I agree with the Majority that land use decisions are generally issues of "local concern." But these very same decisions *necessarily* assume a constitutional dimension when the calculated, intentional and deliberate abuse of government power is at hand. *See Lewis*, 523 U.S. at 846.... The concern that the federal Judiciary will become a local zoning board takes a permanent backseat to the federal Judiciary's obligation to protect the core constitutional freedoms of the American public from *deliberate* and *intentional* governmental deprivation.

United Artists, 316 F.3d 392, 407 (3d Cir. 2003) (Cowen, J., dissenting) (emphasis in original). *Sacramento v. Lewis* should not be read to deprive property owners of the substantive due process protection from arbitrary and irrational official government actions simply because they are categorized as land-use actions.

B. The Lower Courts Have Inconsistently Defined the Contours of the Shocks the Conscience Standard for Property Rights.

The Circuit Courts' uncertainty as to the meaning of "shocks the conscience" outside of the personal injury or bodily invasion context is apparent. Rather than consider the contextual framework of each individual case, in their application of the "shocks the conscience" standard to substantive due process cases involving real property interests, many courts of appeals instead have adopted a virtually insurmountable all-or-nothing standard, and have all

but written the word "property" out of the Fourteenth Amendment. The Third Circuit's application of the concept provides the most dramatic example because of its recent shift from the "improper motive" test to the "shocks the conscience" test.

In overruling its line of cases that held that denial of property rights for "improper motives" established a violation of substantive due process, and holding that under this Court's ruling in *Sacramento v. Lewis*, the "shocks the conscience" test must be applied to land use cases, the Third Circuit failed to provide any guidance regarding the relationship between the two tests, other than to opine that the latter is more stringent. *See United Artists*, 316 F.3d at 400. But in this case, the Third Circuit equated "conscience shocking" with "motivated solely by an intent to harm." Additionally, although the Third Circuit in *United Artists* acknowledged this Court's guidance in *Sacramento v. Lewis* that the determination of whether executive conduct is conscience shocking must be made in the context of a particular case, the Third Circuit has now adopted an "all-or-nothing" approach, holding that "unless the defendants' actions were 'completely unrelated in any way to a rational land use goal,' there is no violation" of substantive due process. (App. 3a). Thus, the Third Circuit imposed on the standard of conduct two absolute and rigid requirements: one of "intent solely to harm" and another of "*completely* unrelated."

Other Circuits have adopted stringent tests, which achieve similar end results (the categorical rejection of substantive due process as a vehicle for redress in real property matters), but each utilizes different language to define the contours. For example, the First Circuit continues its long tradition of recognizing substantive due process protections in land use cases only if they involve

"fundamental procedural irregularity, racial animus, or the like," even where planning officials clearly violate the state scheme under which they operate. *See Creative Env'ts, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982). Most recently, the First Circuit has declined to observe the sliding scale for land use claims, stating that: "We have consistently rejected substantive due process claims arising out of disputes between developers and land planning authorities while leaving the door 'slightly ajar' for 'truly horrendous situations.'" *Macone v. Town of Wakefield*, 277 F.3d 1, 9 (1st Cir. 2002) (quoting *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 45 (1st Cir. 1992). Indeed, the First Circuit's refusal to recognize substantive due process protection in land use cases is almost without exception. *See, e.g., Collins v. Nuzzo*, 244 F.3d 246, 250 (1st Cir. 2001) (substantive due process rejected despite alleged retaliation by local licensing board); *Baker v. Coxe*, 230 F.3d 470, 474 (1st Cir. 2000) ("arbitrary denial of a permit in violation of state law – even in bad faith – does not rise above the constitutional threshold for ... substantive due process claims").

The Second Circuit has held that, for a landowner to prevail, it must demonstrate that the defendants' actions were "so outrageously arbitrary as to constitute a gross abuse of government authority." *See Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999) (citing *Sacramento v. Lewis* at 846); *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 17 (2d Cir. 1999). The Second Circuit, however, has collapsed its "arbitrary" standard into an all-or-nothing rational basis standard, concluding that a governmental determination though it may be outrageously arbitrary, violates substantive due process only if it has "no legitimate government purpose." *See Natale* at 263; *Harlen Assocs. v. Village of Mineola*, 273 F.3d 494, 505 (2d Cir. 2001) (citing *Crowley v. Courville*, 76 F.3d 47, 52 (2d Cir. 1996)); *Lisa's*

Party City, 185 F.3d at 17. The Fourth and Tenth Circuits have adopted similar analyses. *See, e.g., Tri-County Paving v. Ashe County*, 281 F.3d 430, 440 (4th Cir. 2002); *Crider v. Bd. of County Comm'rs of Boulder*, 246 F.3d 1285, 1289 (10th Cir. 2001) (plaintiff must show absence of *conceivable* rational relationship between the government act and a legitimate governmental objective).

The Fifth Circuit has applied the "shocks the conscience" test to alleged deprivations of real property rights with varying approaches. For example, in *Conroe Creosoting Co. v. Montgomery County*, 249 F.3d 337 (5th Cir. 2001), a local tax collector seized and sold at auction all of the assets of the plaintiff in violation of state law, and signed a false affidavit in support of the tax warrant, causing the plaintiff to permanently go out of business. *Id.* at 341-42. With no reference to a rational basis formulation, the Fifth Circuit concluded that the plaintiff had presented sufficient evidence to allow a jury to consider whether the defendant's actions were "shocking to the conscience." *Id.* at 342. By contrast, only one year earlier, the Fifth Circuit in *Simi Inv. Co. v. Harris County*, 236 F.3d 240 (5th Cir. 2000) applied a "rational basis" test. There, a county had sought to block the plaintiff's access to its property to a street by claiming that it had established a park on an intervening, five-foot-wide strip of land. *Id.* at 245-46. The Court framed the ultimate legal question as "whether this denial is rationally related to a legitimate governmental interest," and concluded that because the county could not demonstrate the existence of a park and the asserted existence of the park served no legitimate governmental purpose, the defendants acted without a rational basis, in violation of plaintiff's substantive due process rights. *Id.* at 251-54; *see also Bituminous Materials, Inc. v. Rice County*, 126 F. 3d 1068, 1070-71 (8th Cir. 1997) (despite personal animus, zoning board "had rational bases" to restrict the plaintiff's permit and, therefore,

did not violate substantive due process); *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F. 2d 1102, 1105 (8th Cir. 1992) ("[a] bad-faith violation of state law remains only a violation of state law").

These Circuits have adopted some version of the "all-or-nothing" rigid approach utilized by the Third Circuit in this case, requiring a plaintiff to demonstrate the complete absence of any relationship between a defendant's conduct and any legitimate governmental purpose. In no other area of the law is the burden on a plaintiff so onerous. Even in the context of the high-speed chase, a defendant's conduct can shock the conscience where there is a purpose to cause physical harm *or* worsen the suspect's legal plight. *Sacramento v. Lewis*, 523 U.S. at 854. Nothing in *Sacramento v. Lewis* suggested that the intent to harm must be the only intent or motivation of the official. Moreover, even if *Sacramento v. Lewis* properly could be read to require that the only intent be an intent to harm, as described in Section C, *infra*, where there is a genuine issue of material fact as to true intentions, a jury, not a court, should determine that fact.

Indeed, in no other legal framework, where a defendant can avoid liability by presenting a facially valid reason for his challenged actions, is the plaintiff required to prove at the summary judgment stage of proceedings that the complained of action is "completely unrelated" to the proffered justification. For example, an employer accused of illegal discriminatory action may articulate a nondiscriminatory reason for the action. The plaintiff, however, still can prevail by showing employer's explanation is pretextual. *See, e.g., Raytheon Co. v. Hernandez*, --- U.S. ---, 124 S. Ct. 513, 518, 157 L. Ed. 2d 357, 364 (2003). The jury then gets to decide a disputed issue of intent where there is sufficient conflicting evidence on this point, and even

where there is evidence of mixed motives, liability is found upon a jury determination that discriminatory bias was a "determining and motivating factor" in the matter. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48, 153 (2000); *see also Matthews v. Lucas*, 427 U.S. 495, 510 (1976) (where the defendants have articulated a facially rational basis for their actions, the plaintiff may still prevail by demonstrating the insubstantiality of that alleged relation).

The Third Circuit's "all-or-nothing" approach in this case, however, effectively eliminates the opportunity for a plaintiff to rebut a defendant's asserted rational basis by requiring the plaintiff to prove, at summary judgment, that the defendants actions are "completely unrelated" to any legitimate state interest. Moreover, this construction of the plaintiff's burden is at odds with the well-settled principle that, at the summary judgment stage, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). If any articulable rational basis for a defendant's actions entitles the defendant to summary judgment, then the court is drawing all inferences in favor of the defendant as movant, and not in favor of the plaintiff as nonmovant.

The inconsistency in the formulation of the shocks the conscience standard within these Circuits, and the trend of applying an "all-or-nothing" evidentiary standard at the summary judgment stage of proceedings, demonstrates the necessity of guidance from this Court in analyzing substantive due process cases to preserve the protection of real property rights afforded by the Fourteenth Amendment to the Constitution. Review by this Court is necessary to ensure consistency between this Court's decisions and the Circuit Courts, and to define the appropriate standard by

which executive conduct must be measured in substantive due process cases involving asserted deprivation of real property rights through arbitrary and irrational government interference.

C. The Third Circuit's Decision Conflicts With The Decisions of This Court Concerning the Role of the Court and Jury in Weighing Evidence and Determining Issues in Substantive Due Process Claims.

The Third Circuit's disposition also conflicts with the decisions of this Court concerning the role of courts and juries in weighing the evidence and making credibility determinations for the purposes of addressing whether a stated goal is legitimate or rational or a pretext contrived to justify the official's conduct; whether the official's actions were in furtherance of and rationally related to the stated goal; and, ultimately, whether the totality of the actions rises to the level of arbitrary and irrational conduct so as to constitute a substantive due process violation.

It is beyond dispute that questions of fact must be determined by the fact-finder, i.e., the jury. Indeed, as this Court stated in *Anderson v. Liberty Lobby, Inc.*:

> Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a

> directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

477 U.S. 242, 255 (1986).

This Court has held that the question of whether the contested government action substantially advances a legitimate governmental interest is a mixed question of law and fact, and, in context, the question of "advancement" is one for the jury. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721 (1999). The ultimate question of intent, which is undeniably one for the jury, may be closely intertwined with a dispute over whether there actually exists a legitimate and rational goal or whether the stated goal is supported only by unsubstantiated or irrational factors. In that event, the question of the existence of a legitimate governmental interest is clearly one for the jury and it is only after a finding of a legitimate government interest that the Court should make the legal determination of whether the actions of the governmental actor are rationally related to that legitimate state goal. *See id.* Specifically, this Court stated in *Del Monte Dunes*:

> The jury's role in determining whether a land-use decision substantially advances legitimate public interests within the meaning of our regulatory takings doctrine presents a more difficult question. Although our cases make clear that this inquiry involves an essential factual component, *see Yee [v. Escondido*, 503 U.S. 519, 523 (1992)], it no doubt has a legal aspect as well, and is probably best understood as a mixed question of fact and law. In this case, the narrow question submitted to the jury was whether, when viewed in light of the

> context and protracted history of the development application process, the city's decision to reject a particular development plan bore a reasonable relationship to its proffered justifications. ... As the Court of Appeals recognized, this question was "essentially fact-bound [in] nature." ... Under these circumstances, we hold that it was proper to submit this narrow, fact-bound question to the jury.

Del Monte Dunes, 526 U.S. at 721. This language clearly means that if a trial court recognizes that a plaintiff has produced evidence that defendants' actions are motivated by personal animus and, therefore, are not sufficiently related to any legitimate state interest, *see PFZ Props., Inc. v. Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1992), the trial court should submit to the jury the question of whether the asserted state interest is rationally related to the complained of actions or is mere pretext, *see Matthews v. Lucas*, 427 U.S. at 510, and whether the complained of actions are so egregious as to "shock the contemporary conscience." *See Sacramento v. Lewis* at 847 n.8.

Finally, from the earliest formulation of the shocks the conscience standard, conduct has been measured against the community's conscience, not by the judge's conscience. *See Rochin v. California*, 342 U.S. 165, 175 (1952) ("The majority emphasize that these statements do not refer to their own consciences...") (Black, J., concurring). Even in *Sacramento v. Lewis*, this Court recognized that the measure of "conscience shocking" conduct is determined by reference to the "contemporary conscience." 523 U.S. 847 n.8. The Court did not reference the "judicial conscience."

In this case, the District Court concluded in the first summary judgment proceedings that the evidence demonstrated that "*there is a material issue of fact as to whether the Respondents blocked the Petitioners' land development plans as a matter of land use policy or because they simply did not like Mr. Corneal and wanted to keep such a 'trouble making yuppie' from erecting a home in the Township.*" The District Court continued: "At the very least, Defendants' motives are unclear, and cannot be determined as a matter of law. Determinations as to a party's motivations, like those necessary to resolve the instant matter, are within the province of the jury, not the court." (App. 51a). At that point, the District Court seemed to collapse the "improper motive" review into the question of whether the Respondents were acting in furtherance of a legitimate governmental interest, which, though not a clearly articulated approach to the role of judge and jury in these matters, resulted in the ultimate question of liability properly being left for the jury.

On the renewed motion for summary judgment, however, the District Court accepted without question that the stated land use goal was legitimate, though acknowledging that the moratorium on subdivisions was illegally enacted. The District Court concluded that the Respondents "may have acted with mixed motives; one related to a legitimate land regulation purpose (preserving land development status quo during the final approval process of the subdivision ordinance), the other related to illegitimate personal animus." (App. 22a). This time, the District Court ignored Petitioners' evidence that the Respondents' actions bore no relation to the stated goal, which itself was devised as a pretext to subject Petitioners to their abusive conduct. The District Court made the fact-bound determination that the Respondents' actions were

rationally related to a legitimate state goal, despite the array of disputed evidence on that point.

Indeed, the District Court truncated its review of the evidence, focusing only on the illegal moratorium, and ignoring all the undisputed evidence of other acts of harassment, which it had previously acknowledged would create a question of improper motive for the jury to decide. Much of the evidence – such as the false report of wetlands violations, demands for compliance with non-existent requirements unrelated to development concerns, denial of access to township ordinances, denial of the request for even an application, and the refusal to allow even a garage – concerned actions undisputedly unrelated to any concern, contrived or otherwise, over land development or subdivisions in the township. The Third Circuit then adopted the District Court's decision without question, at once repudiating this Court's directive in *Sacramento v. Lewis* that courts must review the totality of the circumstances in substantive due process determinations, and invading the province of the jury in resolving factual disputes as to motive and intent and whether challenged conduct shocks the conscience.

Even assuming that the Third Circuit was correct in applying a "rational basis" test to the Respondents' conduct for purposes of making the shocks the conscience determination, a plaintiff with evidence of improper motive and evidence of outrageous and persistent acts still must have an opportunity to have a jury decide whether the asserted rational basis was mere pretext, whether the actions furthered the stated goal, and whether the conduct as a whole shocks the contemporary conscience. *See Matthews v. Lucas*, 427 U.S. 495, 510 (1976) (plaintiff has opportunity to demonstrate insubstantiality of alleged rational relationship between executive action and legitimate governmental

purpose); *Seal v. Morgan*, 229 F.3d 567, 580 (6th Cir. 2000) ("determination of whether the school board's action was rationally related to a legitimate state interest is one of law and would be made by court. The question of what the board did, and why, would be questions of fact for the jury.").

Under any formulation of the test for determining whether an official has engaged in unconstitutional conduct, the motive and intent of the defendants are material issues. *See Sacramento v. Lewis* at 854; *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 957 (7th Cir. 2002) (Posner, J., concurring) (under equal protection rationality review, a plaintiff can demonstrate that a government action lacks a rational basis by demonstrating that the action was motivated by animus or by demonstrating that the action bears no rational relation to legitimate state policy).

Outside the context of land-use cases, the Circuit Courts of Appeal, including the Third Circuit, correctly leave to the jury the question of whether particular actions are so egregious as to rise to the level of a substantive due process violation, other than in the most obvious cases of failure to satisfy that standard. *See Estate of Smith v. Marasco*, 318 F.3d 497, 510 (3d Cir. 2003)(district court's conclusion that element of due process claim could not be proven because officers used legitimate tactics usurps the role of the jury where plaintiff presented evidence disputing officers' motives and tactics); *see also Moran v. Clarke*, 296 F.3d 638 (8th Cir. 2002) (case involving false accusations of misconduct sufficient to raise jury question as to substantive due process liability); *Conroe Creosoting Co. v. Montgomery County*, 249 F.3d 337, 342 (5th Cir. 2001) (case involving unauthorized sale of property pursuant to fraudulently obtained tax warrant sufficient to go to jury on substantive due process liability); *Wegant v. Okst*, 101 F.3d 845, 856 (2d Cir. 1996) (whether denial of medical treatment for diabetic

inmate was conscience-shocking was jury question); *Walz v. Town of Smithtown*, 46 F.3d 162 (2d Cir. 1995) (question of whether defendants conduct intentional deprivation one for jury); *see also* 4 MARTIN A. SCHWARTZ & GEORGE C. PRATT, SECTION 1983 LITIGATION: JURY INSTRUCTIONS § 6.02 (2004) (questions of intent are appropriate for jury). There is no precedent or justification for devising a standard that forces courts to encroach upon the well-established province of the jury in substantive due process cases challenging the actions of land use officials.

The Third Circuit's holding in this case has taken from the jury the critical role of weighing the parties' evidence of the existence of an alleged legitimate state interest, the alleged rational relationship between the defendants' actions and that alleged legitimate interest, and the plaintiffs' evidence that tends to disprove both. The court's holding is contrary to established precedent of this Court. Consequently, review by this Court is necessary to ensure consistency in maintaining the role of the jury in substantive due process cases.

CONCLUSION

Petitioners respectfully request this Court grant the Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully Submitted,

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Supreme Court U.S.
FILED
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No.
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IN THE

Supreme Court of the United States

DAVID B. CORNEAL AND SANDRA Y. CORNEAL,
Petitioners

v.

JACKSON TOWNSHIP, HUNTINGDON COUNTY, PENNSYLVANIA, ET AL.,
Respondents

On Petition For Writ Of Certiorari
To the United States Court of Appeals for the Third Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-3587

DAVID B. CORNEAL; SANDRA Y. CORNEAL,
Appellants
v.
JACKSON TOWNSHIP, Huntingdon County, Pennsylvania; W. THOMAS WILSON, Individually and in his Official Capacity as Supervisor of Jackson Township; MICHAEL YODER, Individually and in his Official Capacity as Supervisor of Jackson Township; RALPH WEILER, Individually and in his Official Capacity as Supervisor of Jackson Township; BARRY PARKS, Individually and in his Official Capacity as Sewage Enforcement Officer of Jackson Township; DAVID VAN DOMMELEN, Individually and in his Official Capacity as Building Permit Officer; ANN L. WIRTH, Individually and in her Official Capacity as Secretary of Jackson Township; LARRY NEWTON, Individually and in his Official Capacity as Solicitor to Jackson Township

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On Appeal from the
United States District Court for the Middle District of Pennsylvania (D.C. No. 00-cv-01192)
District Judge: Honorable Sylvia H. Rambo

Argued: March 30, 2004
Before: ALITO, FISHER and ALDISERT, Circuit Judges.

(Filed April 13, 2004)

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Kathryn L. Simpson (Argued) Mette, Evans & Woodside 3401 North Front Street P. O. Box 5950 Harrisburg, PA 17110-0950 Attorney for Appellee, Larry Newton

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OPINION OF THE COURT

FISHER, Circuit Judge.

David and Sandra Corneal appeal the district court's grant of summary judgment to Jackson Township and various officials on claims for substantive due process and tortious interference with contract. Plaintiffs also argue that the district court erred in granting a motion to dismiss the Township solicitor from the case, and in the alternative, suggest that the court abused its discretion in denying leave to amend. We will affirm.

The parties are familiar with the facts and procedural history, which we will not recite except as necessary to the discussion. The Corneals argue that a jury must decide

whether their substantive due process rights were violated by the enactment of a moratorium on subdivisions and other actions that allegedly interfered with the plaintiffs' attempts to subdivide, develop, and sell property they owned in Jackson Township. In *United Artists Theatre Circuit, Inc. v. Township of Warrington, Pa.*, we concluded that "executive action violates substantive due process only when it shocks the conscience." 316 F.3d 392, 399-400 (3d Cir. 2003) (emphasis added). Otherwise, federal courts could be "cast in the role of a zoning board of appeals." *Id.* at 402 (internal quotes removed).

We agree with the district court's discussion of *United Artists* and will not repeat what was addressed in the decision below. As noted by the district court, unless the defendants' actions were "completely unrelated in any way to a rational land use goal," there is no violation. *See County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (due process protects against "exercise of power without any reasonable justification in the service of a legitimate governmental objective"). Although some conduct may evidence personal animus – such as calling Mr. Corneal "that trouble-making yuppie from over the mountain" – under *United Artists*, mere improper motives are not conscious-shocking. *See United Artists*, 316 F.3d at 400-01.[1]

The enactment of the moratorium was related to rational land-use decisions, and as such, fails to shock the conscience. *See Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068, 1070-71 (8th Cir. 1997) (despite personal

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[1] Plaintiffs suggest that one of the defendants had a personal interest in the property, which had previously belonged to that defendant's grandfather in the 1960s. We agree with the district court that no reasonable jury could conclude that the purported motivation was determinative to the defendants' conduct. "Mere speculation about the possibility of the existence of such facts does not entitle [plaintiffs] to go to trial." *Sterling Nat'l Mortgage Co., Inc. v. Mortgage Corner, Inc.*, 97 F.3d 39, 45 (3d Cir. 1996).

animus, zoning board "had rational bases" to restrict the plaintiff's permit). Although the moratorium might not have been in accordance with state law when enacted, even "[a] bad-faith violation of state law remains only a violation of state law." *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102, 1105 (8th Cir. 1992), *cited in United Artists*, 316 F.3d at 402. The defendants' subsequent actions were related to or stemmed from the moratorium, and also fail to shock the conscience, either individually or as a whole.

Detailed discussion of the plaintiffs' other contentions is not necessary. Plaintiffs claim that defendants interfered with the Corneals' contract to sell property to a third party, because the solicitor told the buyers' attorney that he doubted a subdivision ordinance would be adopted by the closing date and may have said that the supervisors would not grant plaintiffs subdivision approval. The buyers pulled out of the contract. Such facts fail to show an intent to interfere and an absence of privilege or justification, both elements of an intentional interference claim. *See Triffin v. Janssen*, 626 A.2d 571, 574 (Pa. Super. 1993) (listing elements and holding that plaintiff failed to meet burden to show defendant lawyer's conduct was unprivileged or unjustified).[2]

Finally, as the claims in this case were properly dismissed, issues regarding the dismissal of the solicitor are moot. Amendment would be futile as it would not change the outcome. *See Krantz v. Prudential Invs. Fund Mgmt. LLC*, 305 F.3d 140, 144 (3d Cir. 2002) (futility justifies denial of leave to amend). Accordingly, the judgment of the district court will be affirmed.

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[2] The only state claim raised in this appeal is the interference with contracts claim. Although plaintiffs broadly pray for reversal of their "state law claims," such a passing reference is insufficient to bring unaddressed issues before this Court on appeal. *Simmons v. City of Phila.*, 947 F.2d 1042, 1066 (3d Cir. 1991).

DAVID B. CORNEAL and SANDRA Y. CORNEAL,
Plaintiffs,
v.
JACKSON TOWNSHIP, Huntingdon County, Pennsylvania, et al.,
Defendants.

CIVIL NO. 1:CV-00-1192

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

313 F. Supp. 2d 457

July 28, 2003, Decided

OPINION:

MEMORANDUM

Before the court are Defendants' renewed motion for summary judgment and Plaintiffs' motion for partial reconsideration of the court's order of December 23, 2002. The parties have briefed the issues, and the matters are now ripe for disposition.

I. BACKGROUND

Plaintiffs, David and Sandra Corneal ("the Corneals"), filed this case alleging the following: violations of their rights pursuant to the Fifth and Fourteenth Amendments to the United States Constitution (Count I); that Defendants engaged in a civil conspiracy in violation of Pennsylvania common law (Count II); that Defendants intentionally interfered with the Corneals' contractual relations (Count III); and that Defendants' actions violated

the Pennsylvania Constitution (Count IV). Defendants in this action include the following: (1) Jackson Township, Pennsylvania; (2) W. Thomas Wilson; (3) Michael Yoder; (4) Ralph Wiler; (5) Ann L. Wirth, Jackson Township Secretary; (6) David Van Dommelen, Jackson Township's building permit officer; and (7) Barry Parks, Sewage Enforcement Officer for Jackson Township. Defendants Wilson, Yoder, and Wiler are members of the Jackson Township Board of Supervisors ("the Board"). The court has subject matter jurisdiction over this action based on 28 U.S.C. §§ 1331 and 1367.

A. Facts

Construing all genuine disputes of fact in favor of the Corneals, the non-moving party, the following constitutes the relevant factual background to the instant motions. In 1998, the Corneals, who reside in State College, Pennsylvania, acquired a ninety-five acre tract of land located in Jackson Township, Huntingdon County, Pennsylvania. The property had previously been part of the estate of Defendant Wilson's grandfather. When the Corneals purchased the property, a house and a barn were already located on it. The Corneals planned to subdivide and sell a portion of the tract. To assist them in obtaining approval from the Township, the Corneals had the tract surveyed and prepared a subdivision plan. The Corneals also hired Defendant Parks, the Township's Sewage Enforcement Officer ("SEO"), to test the tract's suitability for an on-site septic system. Defendant Parks located suitable sites on the tract. After identifying the suitable septic sites, the Corneals hired Defendant Wilson's private firm, Eagle Excavation, to conduct percolation tests. The tests were successful, and the Corneals paid Eagle Excavation for its services. At the time Defendant Wilson's firm performed the percolation tests, the Township had not enacted a moratorium on land use subdivision. After

receiving the proposed sewage modules from the Corneals' agent, David Simpson, Defendant Parks reviewed and signed them.

During August and September of 1999, the Corneals prepared a subdivision plan and marketed one of the lots, a twenty-five acre tract, on which sat the pre-existing house and barn. On October 7, 1999, the Corneals entered into a contract to sell the tract for $ 150,000 to John Hewett, Jr. and Joann Smith ("the Buyers"). In accordance with the contract's terms, the Buyers submitted a down payment of $4,000 and agreed to pay $500 per month against the purchase price until settlement, scheduled for June 30, 2000.

During this period, Jackson Township did not have a subdivision ordinance to govern the development of land.[1] However, at its meeting in January of 2000, the Board, by unanimous vote, decreed a temporary moratorium on subdividing property pending the enactment of a formal ordinance governing subdivision and land development. The moratorium was not enacted pursuant to a resolution or any other formal action. It merely appeared in the meeting's minutes. Besides its appearance in the meeting minutes, no other documents exist relating to the moratorium.

The Corneals presented their original subdivision plan to the Board at the Township meeting in February of 2000. The plan indicated that the original ninety-five acre tract would be subdivided into three lots. On the largest of those lots, the Corneals planned to build their own home. Because of the newly-imposed moratorium, Defendants Wilson, Yoder, and Wiler refused to review the Corneals' subdivision plan. Within several days of the Board's refusal to review the plan, the Corneals submitted the plan to the Huntingdon

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[1] Huntingdon County has a Land Development Guide ("the Guide"). However, the Guide is not an ordinance pursuant to the provisions of the Municipalities Planning Code ("MPC"). *See* 53 Pa. Cons. Stat. § 10101, *et seq.*

County Planning Commission ("CPC"), pursuant to the Board members' advice. The CPC reviewed the plan and, by way of a letter dated February 24, 2000, provided comments and recommendations. The CPC recommended that the Township deny approval of the plan in light of the Township's pending subdivision ordinance and the moratorium against subdividing property.

At the Board's meeting on April 3, 2000 Mr. Corneal requested that the Board sign five sewage modules. The Board, however, refused to do so. Mr. Corneal then stated that he was no longer planning on subdividing his property, but that he needed the sewage modules to obtain a building permit to begin construction of his own home. The Board, however, refused to issue five sewage modules for one house.[2] Moreover, the Board claimed that if they were to sign the sewage modules, that would be the same as permitting the Corneals to build their house, and that this would constitute a subdivision, prohibited by the moratorium, because the tract already had an existing dwelling located on it.

Mr. Corneal then requested a privy permit so that he could begin construction of his two story garage and art studio. The Board members, however, indicated that they were not permitted to issue privy permits; that the Corneals would have to get that from Defendant Parks, the SEO. After that meeting, Mr. Corneal called Defendant Parks and requested a privy permit. Defendant Parks indicated that

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[2] According to the Board, because their tract already had an existing dwelling on it, the Board would have essentially granted the Corneals a subdivision if it had granted their request for a building permit to construct their own home. Similarly, Defendants contend that if Defendant Van Dommelen had granted Mr. Corneals' building permit application with respect to the house, his granting of that permit would have essentially caused a subdivision due to the existing dwelling on the property. (*See* Van Dommelen Depo. at p. 49.)

Defendant Wirth had called him and instructed him not to issue the Corneals a privy permit. However, during his deposition, Defendant Parks indicated that he was without authority to issue the Corneals a privy permit, which – according to state regulations – could only be issued to lots subdivided before 1972 and which did not have piped and running water connected to any other structure on the lot. Because the Corneals' tract had an existing structure on it with piped and running water, Defendant Parks would be unable to issue a privy permit to the Corneals.[3] The Corneals then called Larry Newton, an attorney and Township Solicitor, to discuss the situation, but the Corneals did not receive a substantive response.

The Corneals revised the plan in hopes of receiving approval. They developed a new plan that reflected not three lots, but only two. One of these lots would be sold to the Buyers under the terms of their already existing contract with the Corneals. The other lot would contain the residual amount of land, approximately sixty-nine acres, on which the Corneals would build a house, an art studio, and a garage. The Corneals submitted the revised plan to the CPC. On April 20, 2000, the CPC recommended conditional approval by the Township, pending adoption of the proposed land development ordinance. The CPC found that the revised plan appeared to conform to the proposed ordinance. The Corneals, however, never submitted the revised two-lot subdivision plan to the Township. According to Mr. Corneal, he felt that such a submission would be futile due to the Township's moratorium. (*See* Corneal Depo. at p. 114.)

Wanting to begin developing the land, the Corneals constructed a one and a half (1.5) mile driveway through the

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[3] Even if the Corneals had received approval to subdivide the property between the portion containing the existing structures and the remainder, they still would not have been eligible for a privy permit because the property would have been subdivided subsequent to 1972.

tract at some point in the Spring of 2000. The Corneals originally requested Defendant Wilson's firm, Eagle Excavation, do the work. However, Defendant Wilson later refused the job. While constructing the driveway, the United States Army Corps of Engineers and the Commonwealth of Pennsylvania Department of Environmental Protection approached the chosen contractor to investigate a complaint that the Corneals were violating wetlands regulations. The complaint was found to be without merit. The Corneals contend that Defendants Wilson and/or Defendant Wirth filed the complaint.

Next, Mr. Corneal went to Defendant Van Dommelen, the Township's Building Permit Officer, to obtain a building permit for his garage. Defendant Van Dommelen, however, refused to issue the permit because the Board had instructed him not to issue any permits to the Corneals. Defendant Van Dommelen even called Defendant Wilson, in Mr. Corneal's presence. During that conversation, Defendant Wilson told Defendant Van Dommelen: "don't you dare issue [David Corneal] a permit." (Wilson Depo. at p. 128.) Defendant Van Dommelen, however, had granted every other building permit application submitted to him in 2000. (Van Dommelen Depo. at p. 103.) Although Defendant Van Dommelen never refused to provide any other person in the Township with a permit, he refused to even provide the Corneals with a permit *application. (See Id.* at p. 56.) During his conversations with Mr. Corneal, Defendant Van Dommelen referred to Mr. Corneal as a "trouble making yuppie from over the mountain." (*Id.* at p. 71.) He used this term to describe Mr. Corneal because Mr. Corneal "just behaves like someone who wants to get their own way and his age group." (*Id.* at p. 73.)

On May 1, 2000, the Corneals received a letter from the Buyers' attorney. The letter informed the Corneals that the Buyers had terminated the agreement to purchase the

tract due to difficulties with the Township in obtaining subdivision approval. The Buyers also requested that their down payment of $4,000 be refunded along with the $3,000 in payments ($500 per month) paid to the Corneals in expectation of the settlement date of June 30, 2000. The Buyers' attorney, Harvey Reeder, shared an office with Township Solicitor Larry Newton at all times relevant to this litigation. Reeder asked Newton if he believed that the Corneals would be able to convey the property to the Buyers by the previously agreed upon settlement date of June 30, 2000. Newton responded that he did not believe the Corneals would be able to do so. After the Buyers pulled out of their contract to purchase the subdivided portion of the Corneals' land, Defendant Wilson's nephew approached Mr. Corneal about the possibility of purchasing the tract.

On either July 7 or July 10, 2000, the Board approved its subdivision ordinance, along with driveway and privy ordinances. The Corneals began construction without a permit from the Township at some point in July of 2000. In October 2000, the Township brought suit against the Corneals to enjoin their construction. The parties, however, settled that matter. Since the filing of the instant lawsuit on June 30, 2000, the Township has granted the Corneals all permits and approvals necessary to begin development of their tract.

B. Procedural History

On June 30, 2000, the Corneals filed their original complaint in this matter. In that document, the Corneals named Newton as a defendant along with the captioned Defendants. In Count I of that document, the Corneals claimed that Defendants, acting under color of state law, deprived them of their clearly established right and privilege to own, use, dispose, and develop their property as protected by the United States Constitution. In Counts II through IV,

the Corneals made claims for civil conspiracy, intentional interference with contractual relations, and violations of the Pennsylvania Constitution. All Defendants filed a motion to dismiss the complaint. On March 29, 2001, the court granted the Township's motion to dismiss Count III of the original complaint, regarding the claim of intentional interference with contractual relations. The court held that the claim was barred by the Pennsylvania Subdivision Torts Claim Act ("the PSTCA"). *See* 42 Pa. Cons. Stat. § 8541, *et seq.* However, the court refused to dismiss Count III as to the individual Defendants. Additionally, the court granted Newton's motion to dismiss him as a defendant in the case. The Corneals filed a motion for reconsideration on April 12, 2001, and an amended motion for reconsideration on July 27, 2001. On September 12, 2001, the court denied the motion for reconsideration. On October 18, 2001, however, the court granted the Corneals leave to file an amended complaint. The Corneals filed an amended complaint on November 6, 2001. Like the original complaint, the amended complaint alleged violations of substantive and procedural due process (Count I), state law claims for civil conspiracy (Count II), intentional interference with contractual relations (Count III), and violations of the Pennsylvania Constitution (Count IV).

After the conclusion of discovery, the parties filed cross-motions for summary judgment. On December 23, 2002, the court issued an order denying the Corneals' motion for summary judgment, and granting in part and denying in part Defendants' motion for summary judgment. *See Corneal v. Jackson Township*, No. 1: CV-00-1192, order (M.D. Pa. Dec. 23, 2002). Specifically, the court granted summary judgment in favor of all Defendants on the Corneals' procedural due process claim and their claim for intentional interference with contractual relations (Count III). Additionally, the court granted summary judgment in favor

of the Township on the Corneal's claim for civil conspiracy (Count II).

However, the court denied Defendants' motion for summary judgment in several respects. Most importantly, the court held that a trial was required on the Corneals' claim that Defendants violated their substantive due process rights under the Fourteenth Amendment to the United States Constitution. Relying principally on *Midnight Sessions Ltd. v. City of Philadelphia*, 945 F.2d 667 (3d Cir. 1991), *Bello v. Walker*, 840 F.2d 1124, 1128 (3d Cir. 1988), and *DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592 (3d Cir. 1995), the court held that there was a genuine dispute regarding whether Defendants had acted with an improper motive in imposing the subdivision moratorium and in blocking the Corneals from initiating construction on their property. *See Corneal v. Jackson Township*, No. 1: CV-00-1192, memo. at Part III.A.2 (M.D. Pa. Dec. 23, 2002) [hereinafter "Initial Summary Judgment Memo."]. With respect to Counts II and IV – the Corneals' claims for civil conspiracy and violation of their due process rights under the Pennsylvania Constitution – the court likewise held that there was a material issue of fact regarding whether Defendants' acted with an improper motive. *See Id.* at Parts III.B.1 and 3.

Midnight Sessions, Bello, and *DeBlasio* all stand for the proposition that, in the context of land use cases, allegations that a local executive body acted with an improper motive are sufficient to state a valid claim for violation of substantive due process under the Fourteenth Amendment to the United States Constitution. Twenty-two days after the court issued its summary judgment opinion in the captioned matter, however, the Third Circuit Court of Appeals declared that the "improper motive" test no longer governs substantive due process challenges to local land use decisions. *See United Artists Theatre Circuit, Inc. v.*

Township of Warrington, 316 F.3d 392, 401 (3d Cir. 2003). Instead, challenges to those decision are valid only if the locality's actions "shock the conscience." *Id.* at 402. In light of the Third Circuit's holding, this court subsequently vacated its summary judgment decision regarding the Corneals' substantive due process claim, Count II, and Count IV. Additionally, the court ordered the parties to re-brief Defendants' summary judgment motion as to these issues in light of the Third Circuit's decision in *United Artists Theatre Circuit.* On April 1, 2003, Defendants filed the instant motion. Previous to the court's partial vacatur, the Corneals filed a motion for reconsideration of the court's decision to grant summary judgment in favor of the individual Defendants' on the intentional interference with contractual relations claim (Count III).

II. DISCUSSION

A. Defendants' Motion for Summary Judgment

1. Legal Standard

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Saldana v. Kmart Corp.*, 43 V.I. 361, 260 F.3d 228, 231-32 (3d Cir. 2001) (quoting *Armbruster v. Unysis Corp.*, 32 F.3d 768, 777 (3d Cir. 1994) (internal quotation omitted)). A factual dispute is "material" if it might affect the outcome of the suit under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A factual dispute is "genuine" only if there is a sufficient evidentiary basis which would allow a reasonable fact-finder to return a verdict for the non-moving party. *Id.* at 249. The court must resolve all

doubts as to the existence of a genuine issue of material fact in favor of the non-moving party. *Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir. 1985); *see also Reeder v. Sybron Transition Group*, 142 F.R.D. 607, 609 (M.D. Pa. 1992).

Once the moving party has shown that there is an absence of evidence to support the claims of the non-moving party, the non-moving party may not simply sit back and rest on the allegations in its complaint. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Instead, they must "go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, and designate specific facts showing that there is a genuine issue for trial." *Id.* (internal quotations omitted); *see also Saldana*, 260 F.3d at 232 (citations omitted). Summary judgment should be granted where a party "fails to make a showing sufficient to establish existence of an element essential to that party's case and on which that party will bear the burden at trial." *Celotex*, 477 U.S. at 322-323. "'Such affirmative evidence - regardless of whether it is direct or circumstantial -- must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance." *Saldana*, 260 F.3d at 232 (quoting *Williams v. Borough of West Chester*, 891 F.2d 458, 460-61 (3d Cir. 1989)).

2. Application

a. Count I: Substantive Due Process

The crux of the Corneals' substantive due process claim is that Defendants acted in concert to frustrate the Corneals' effort to subdivide and develop their ninety-five acre tract of land. According to the Corneals, Defendants needlessly complicated and delayed the Corneals' applications for permits and subdivision, thereby causing the Buyers to cancel their sales contract with the Corneals.

Drawing all genuine factual disputes in favor of the Corneals, it appears that Defendants intentionally opposed the Corneals' efforts, at least in part, because they did not like the Corneals.[4] That is, they felt Mr. Corneal was a "trouble making yuppie from over the mountain." (Van Dommelen Depo. at p. 71.)[5] Finally, the Corneals also contend that Defendant Wilson intentionally held up the subdivision process so that the Corneals would be unable to convey a portion of the tract to the Buyers on June 30, 2000. According to the Corneals, Defendant Wilson wished to prevent this contract from culminating so that he or his nephew could purchase the property, which belonged to Defendant Wilson's grandfather until 1960.

"To succeed in a substantive due process claim under Section 1983, 'a plaintiff must establish as a threshold matter

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[4] The Corneals also contend that Defendant Wilson acted out of malice against them because the Corneals used Defendant Wilson's construction company, Eagle Excavation, for the initial percolation tests, but did not intend to use that firm for any of the remaining construction work. However, their own recitation of the facts in this case belies this contention. In their brief in opposition to Defendants' renewed motion for summary judgment, the Corneals state that after Eagle Excavation conducted the initial percolation tests and after the Board had enacted the moratorium on subdivision, Mr. Corneal attempted to use that firm - owned by Defendant Wilson - to construct a driveway. According to the Corneals, "Defendant Wilson later refused the job, so the Corneals hired a different contractor." (Pls. Br. in Opp. Renewed Mot. for Sum. J. at 10.)

[5] It appears that the Corneals' argument against summary judgment is premised, in large part, on this statement. While the Corneals, as the non-moving party "are entitled to all inferences which are fairly supported by the evidence ... [they] are not permitted to build their case on mere 'opprobrious epithets' of malice ... or the 'the gossamer threads of whimsey, speculation and conjecture.'" *Creative Env'ts, Inc. v. Estabrook*, 680 F.2d 822, 830 (1st Cir. 1992) (quoting *Snowden v. Hughes*, 321 U.S. 1, 10, 88 L. Ed. 497, 64 S. Ct. 397 (1943) and *White v. The Hearst Corp.*, 669 F.2d 14, 19 (1st Cir. 1962) (internal quotations omitted)).

that he has a protected property interest to which the Fourteenth Amendment's due process protection applies.'" *Grimm v. Sweeney*, 249 F. Supp. 2d 571, 608 (E.D. Pa. 2003) (quoting *Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118, 123 (3d Cir. 2000)). Ownership of property subject to a local land use regulation is a property interest entitled to substantive due process protection. *See DeBlasio*, 53 F.3d at 600.[6] As stated previously, in the context of land use decisions, only conduct which is so irrational as to "shock the conscience," gives rise to a substantive due process violation. *See United Artists*, 316 F.3d at 401-02.

While the Third Circuit in *United Artists Theatre Circuit* made clear that the "shocks the conscience" test governs substantive due process challenges to land use decisions, it did not decide whether the defendants' actions in that case were enough to survive a motion for summary judgment. 316 F.3d at 402 ("Having found that the District Court applied the wrong standard for evaluating United Artists' substantive due process claim ... we vacate the District Court's denial of the Supervisors' summary judgment motion and remand the case for further proceedings to determine whether United Artists can survive the Supervisors' summary judgment motion ...."). However, the court cited with approval lines of cases from the First and Eighth Circuits applying this standard. *See Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32 (1st Cir. 1992); *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992); *PFZ Props., Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991); *Creative Env'ts, Inc. v.*

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[6] Although *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d at 401, overruled that aspect of *DeBlasio* dealing with the standard to be applied in substantive due process challenges to executive action, it left undisturbed *DeBlasio's* holding that property subject to local land use regulations is a property interest protected by substantive due process.

Estabrook, 680 F.2d 822 (1st Cir. 1982). These cases stand for the proposition that unless the locality's decision was "truly irrational," no substantive due process violation occurs. *Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068, 1070 (8th Cir. 1997). "To sustain such a claim, plaintiff must prove that the government action in question is 'something more than ... arbitrary, capricious, or in violation of state law.'" *Id.* (quoting *Chesterfield Dev. Corp.*, 963 F.2d at 1104). "Thus, even allegations of bad faith enforcement of an invalid zoning ordinance do not, without more, state a substantive due process claim." *Id.*

As best this court can discern, to survive summary judgment under the "shocks the conscience" test, rather than the "improper motive" test, the Corneals must have adduced evidence from which a reasonable jury could conclude that the Board's actions did not serve any rational land use purpose.[7] *See Dolan v. City of Tigard*, 512 U.S. 374, 387, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994) (holding that absence of nexus between permit condition and legitimate state interest converts valid land regulation into an "out-and-out plan of extortion"). As a result, unless the evidence indicates that the challenged decision is completely unrelated in any way to a rational land use goal, there is no violation of substantive due process. The corollary of that rule being that where the locality's decision is related in any way to some

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[7] To hold that evidence need only demonstrate that improper motives played a part in the Board's decision – as the Corneals continue to claim – would be to revert to *Bello's* "improper motive" test, which the Third Circuit has rejected. *See United Artists Theatre Circuit*, 316 F.3d at 401. In adopting the "shocks the conscience" test as a replacement for the "improper motive test," the Third Circuit implied that the "shocks the conscience" test was more stringent than the "improper motive" test. Moreover, the Eight Circuit and First Circuit cases which the Third Circuit cited with approval confirm this. *See, e.g., Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32 (1st Cir. 1992); *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992).

rational goal, then no due process violation occurs even if the locality may have exceeded the scope of its jurisdiction. *See also infra* at p. 21-22.

In its research of this issue, the court has only uncovered a single case where a plaintiff's substantive due process challenge to a local land use decision survived a summary judgment motion under the "shocks the conscience" test. *See Collier v. Town of Harvard*, CV No. 95-11652-DPW, 1997 U.S. Dist. LEXIS 23582 (D. Mass. Mar. 28, 1997). In that unpublished case, the plaintiffs sought to expand their small herb house, located in the historic district of Harvard, Massachusetts, into a larger year-round residence. This plan required that the plaintiffs obtain several permits and zoning variances from Harvard's Zoning Board of Appeals ("ZBA"). The ZBA was advised on such matters by the Harvard Planning Board ("HPB"). One of the plaintiffs' neighbors, Richard DeBoalt, was a member of the HPB. Previous to the plaintiffs' filing of the necessary applications, DeBoalt had sought an easement from the plaintiffs for rear access to his property. DeBoalt also vehemently opposed the plaintiffs' plans. When the HPB considered the plaintiffs' application, DeBoalt attended the HPB's confidential discussion, but did not vote. The HPB recommended that the ZBA deny the plaintiffs' application. At some point, the ZBA chairperson visited the plaintiffs at their home and instructed them that the application process "would go more smoothly" if they granted DeBoalt his requested easement. *Id.* 1997 U.S. Dist. LEXIS 23582 at *7 n.5. In the days before the plaintiffs' second application was scheduled to be heard by the ZBA, DeBoalt's counsel faxed the plaintiffs' counsel a letter indicating that DeBoalt had no objection to the application, but that he was "waiting for a copy of a draft easement from [the plaintiffs]." *Id.* 1997 U.S. Dist. LEXIS 23582 at *24. Later, on the day of the ZBA's meeting, DeBoalt's counsel faxed the plaintiffs' counsel a

letter stating that "the agreement and easement need to be finalized today because the meeting is tonight." *Id.* 1997 U.S. Dist. LEXIS 23582 at *8. The plaintiffs, however, refused to issue DeBoalt an easement, even after he indicated that he would introduce evidence that would preclude relief from the ZBA if he did not get the easement. Subsequently, the plaintiffs received a proposal from the ZBA laying out a plan that the plaintiffs would be required to adopt if they wished to obtain the permits necessary for their plan. Among those requirements, the proposal stated that the plaintiffs should "bite the bullet and accept responsibility for negotiating access accommodation with [his] neighbors (the Town and DeBoalt)." *Id.* 1997 U.S. Dist. LEXIS 23582 at *10. No compromise regarding the easement occurred, and the plaintiffs' permit applications were denied. At the summary judgment phase, the court held that there was a genuine issue of material fact regarding whether DeBoalt acted out of purely improper personal motivations and whether members of the ZBA assisted him in his allegedly nefarious endeavor. Essentially, *Collier* involved an allegation of governmental extortion. That is, the plaintiffs' applications would have been approved if they simply capitulated to the public official's request for an easement across their property. As a result, the court found that a reasonable jury could have concluded that the ZBA's decision to deny the plaintiffs' application was fueled solely by personal motivations totally devoid of any rational land use planning concerns. Thus, *Collier* fell within the very narrow class of challenges to local land use decision which are "truly horrendous." *See Welch v. Paicos*, 66 F. Supp. 2d 138, 169 (D. Mass. 1999) (discussing *Collier*).

In the case at bar, the court cannot say that the Board's decisions were so totally unrelated to any legitimate land use planning goal that a reasonable jury could conclude that the Board's actions were totally irrational. It is

undisputed that the Township did not have a subdivision ordinance in effect in January of 2000. Likewise, it is beyond dispute that the Township had been working on developing such an ordinance in conjunction with Huntingdon County officials for approximately two years before the Corneals submitted their original subdivision proposal. Several citizens had voiced concern to the Board regarding the fact that the Township did not have any restrictions regarding subdividing of property. These citizens encouraged the Board to develop such a plan to preserve the Township's rural character. While the Board may have caught wind of the Corneals' plans and hastily decided to impose a moratorium, that decision served the purpose of maintaining the status quo of land development during the final approval process of the subdivision ordinance. Although the evidence could indicate that the Corneals' plans were the fulcrum for the Board's action, there is no indication that they were singled out for particularly harsh treatment.[8] In fact, the Township refused to review any subdivision proposals while the moratorium was in effect. Although the Corneals point to a litany of other decisions relating to the issuance of building permits and sewage modules, those decisions are properly viewed as extensions of the Board's initial decision to halt all subdividing in the Township until the Board could enact a comprehensive land use ordinance. Moreover, subsequent to the enactment of the

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[8] The Corneals point to the fact that Defendant Van Dommelen granted all other building applications submitted to him, but he refused to even provide the Corneals with a permit application. While other applicants sought similar permits, no other permit applicant was similarly situated. Unlike the other applicants for building permits during the pendency of the moratorium, the Corneals needed to subdivide their property to be eligible for the building permits they sought, due to the existing dwelling on their property. (*See* Van Dommelen Depo. at 49.) Of course, the Corneals were not allowed to subdivide because the Board had enacted a moratorium on all subdivision.

Township's subdivision ordinance in July of 2000, the Corneals received all necessary permits and approvals to develop their land.

At best, the court finds that the totality of the facts, when viewed in the light most favorable to the Corneals, establishes that the Board may have acted with mixed motives; one related to a legitimate land regulation purpose (preserving land development status quo during the final approval process of the subdivision ordinance), the other related to illegitimate personal animus.[9] This is not enough to establish a violation of substantive due process. In *Bituminous Materials Inc. v. Rice County*, 126 F.3d 1068, 1071 (8th Cir. 1997), the Eighth Circuit, relying on *Chesterfield Development Corp.*, held that allegations of personal animus, alone, are not enough to survive a summary judgment motion in a substantive due process challenge to a local land use decision. In that case, the plaintiff, BMI, challenged a decision by the Rice County, Minnesota Board of Commissioners to impose extra restrictions on BMI's

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[9] The Corneals also contend that Defendants acted out of desires of personal gain. According to them, Defendants sought to frustrate the Corneals' efforts because the property in question, through 1960, belonged to Defendant Wilson's grandfather and Defendant Wilson's nephew twice approached the Corneals about purchasing the property. No reasonable jury could conclude, based on this evidence, that this was the determinative factor in Defendants' decision to impose the moratorium. Moreover, even if Defendant Wilson were ill motivated, it would be improper to impute that motive to any of the other Defendants without evidence that they possessed a similar motive and willingly participated in Defendant Wilson's alleged scheme. *See Collins v. Nuzzo*, 244 F.3d 246, 251 (holding that for one member's improper motivation to be imputed to a legislative body for Section 1983 purposes, the evidence must indicate "both (a) bad motive on the part of at least a significant bloc of legislators, and (b) probable complicity of others" (quoting *Scott-Harris v. City of Fall River*, 134 F.3d 427, 438 (1st Cir. 1997) *reversed on other grounds sub nom. Bogan v. Scott-Harris*, 523 U.S. 44, 140 L. Ed. 2d 79, 118 S. Ct. 966 (1998))).

permit to locate a temporary asphalt pit in Rice County. At *the summary judgment* stage, BMI presented evidence that the Board's decision to impose the conditions was motivated by the Board's personal animus toward BMI's permit officer. In support of this claim, the permit officer indicated that when he requested that BMI not be subject to extra conditions that other gravel pit operators in the county were not subject to, one of the Board members replied, "We are the county, we make the rules and we can change them as we choose." 126 F.3d at 1071. When confronted with evidence that the Board was treating BMI more harshly than other pit operators, another Board member stated to the permit officer, "We have been screwing you over." *Id.* Other Board members echoed these sentiments, making comments to the effect that they did not care if BMI ever did business in Rice County again and that the permit officer was an "SOB." *Id.*

The district court, however, granted summary judgment in favor of Rice County. On appeal, the Eighth Circuit upheld that decision, stating that "the Board had rational bases upon which to restrict BMI's permit." *Id. 126 F.3d at 1070.* Specifically, the court held that Rice County citizens had expressed concerns about road damage, environmental damage, traffic safety and noise caused by BMI's operation of the gravel pit. In discussing the evidence regarding the Board members' personal dislike of the permit officer, the court stated the following:

> We conclude that these allegations are far too insubstantial to support a substantive due process claim. We acknowledge that there may be cases where land use decisions are so corrupted by the personal motives of local government officials that due process rights are implicated ... But it would be inconsistent with the high threshold we established in *Chesterfield* to hold that a substantive due

> process claimant will survive summary judgment by alleging that a land use planning decisionmaker does not like the plaintiff. That sort of inquiry would indeed turn the federal courts into zoning boards of appeal. Therefore, the district court properly dismissed BMI's substantive due process claim.

Id. (citations omitted).

Thus, it appears from these lines of cases that a substantive due process claim under the "shocks the conscience" test will survive summary judgment only if the plaintiff can present evidence from which a jury could conclude that the locality's decision was not rationally related to a legitimate land use goal. As a result, the plaintiff must demonstrate that the land use decision or regulation was so totally irrational that it could not possibly be the real reason for the locality's action or, alternatively, that the locality applied its decision selectively so that its land use concern could not have been legitimate despite the rational basis for it. While this is obviously an onerous burden to plaintiffs, the reason for it is not without logical support. As the First Circuit stated:

> Substantive due process, as a theory of constitutional redress, has in the past fifty years been disfavored, in part because of its virtually standardless reach. To apply it to claims like the present would be to insinuate the oversight and discretion of federal judges into areas traditionally reserved for state and local tribunals. Clearly, it is no simple matter to decide what abuses to regard as abuses of "substantive" due process. Every litigant is likely to regard his own case as involving such

> an injustice. Thus, we have consistently held that the due process clause may not ordinarily be used to involve federal courts in the rights and wrongs of local planning disputes. In the vast majority of instances, local and state agencies and courts are closer to the situation and better equipped to provide relief. We have left the door slightly ajar for federal relief in truly horrendous situations. But, this circuit's precedent makes clear that the threshold for establishing the requisite "abuse of government power" is a high one indeed.

Nestor Colon Medina & Sucesores, 964 F.2d at 45.

When viewed under this standard, it is evident that the Corneals' claim does not constitute a substantive due process violation under the "shocks the conscience" test. Like the defendants in *Bituminous Materials Inc.*, the Board had rational reasons to enact a moratorium on subdividing property pending the enactment of a comprehensive subdivision ordinance. Moreover, unlike the claim in *Bituminous Materials Inc.*, there is no evidence that the Board subjected the Corneals to disparate treatment. The Corneals have not presented any evidence that other developers or land owners were granted subdivision approval during the pendency of the moratorium or that the Board subjected the Corneals to more onerous conditions as other similarly-situated permit applicants. Thus, the Corneals have failed to adduce evidence from which a reasonable jury could conclude that Defendants' rational land use concern is a mere pretext.

The Corneals, however, also argue that the Board did not have the power to enact the moratorium and that this fact, when combined with the other circumstantial and direct evidence in this case, indicates that there is a genuine dispute

of material fact regarding whether the Board's actions "shock the conscience." The court, however, finds that even if the Board lacked the authority to enact the moratorium and may not have followed the proper procedure for enacting it, these facts will not insulate the Corneals' claim from summary judgment. It is undisputed that in January of 2000, before the Corneals had even submitted their original subdivision plan, the Board enacted a moratorium on any and all subdividing or conveying of property located in the Township. Before enacting this measure, Defendant Wirth consulted with Newton, the Township's solicitor, regarding whether the Township had the power to enact a moratorium. He indicated that the Board had such power. *(See* Newton Depo. at p. 25.) Although this conclusion appears to have been wrong in light of Pennsylvania law, an error of state law does not amount an actionable claim for violation of substantive due process. *See Chesterfield Dev. Corp.*, 963 F.2d at 1105 (8th Cir. 1992) ("A bad-faith violation of state law remains only a violation of state law."); *Welch v. Paicos*, 66 F. Supp. 2d at 167 ("Even when a planning board abuses its discretion, or disobeys state law in some manner, the federal courts will not automatically find a due process violation.").[10]

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[10] Moreover, while it is disputed whether Defendants enacted the moratorium in bad faith, it is undisputed that Defendants inquired with Solicitor Newton as to whether the Township had the authority to impose such a temporary moratorium. (*See, e.g.*, Yoder Depo. at p. 68.) Solicitor Newton indicated that it did. *Id.* As it turns out, that advice was incorrect. Although at that time, Pennsylvania law indicated that localities had the authority to impose temporary moratoria on land development, they could only undertake such action while in the process of amending a previously-enacted subdivision ordinance. *Naylor v. Township of Hellam*, 717 A.2d 629, 633 (Pa. Commw. Ct. 1998). However, Jackson Township had not enacted a subdivision ordinance before imposing its moratorium in January of 2000. Thus, its actions were not in compliance with the Commonwealth Court's decision in Naylor. In any event, the Pennsylvania Supreme Court later overturned the Commonwealth Court's decision, holding that any and all moratoria on land development violate the Pennsylvania Constitution. *Naylor v.*

In summation, the court finds that the Corneals have failed to adduce facts from which a reasonable jury could conclude that the Board's actions were wholly divorced from any rational and legitimate land use concerns, *i.e.* that the Board's actions "shock the conscience." At best, the evidence, viewed in the light most favorable to the Corneals, indicates that the Board's actions were based on mixed motives which at least partly were related to rational and legitimate land use concerns. Accordingly, the court will grant summary judgment in favor of the Board on the Corneals claim in Count I for violation of their substantive due process rights.[11]

b. Count II: Civil Conspiracy

In Count II of the amended complaint, the Corneals claim that Defendants' actions constituted a civil conspiracy. Under Pennsylvania law, to recover for civil conspiracy, three elements must be proven: (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage. *McKeeman v. Corestates Bank, N.A.*, 2000 PA Super 117, 751 A.2d 655, 660 (Pa. Super. Ct. 2000).

Township of Hellam, 565 Pa. 397, 773 A.2d 770, 776-77 (Pa. 2001) ("However much a rapidly expanding municipality may wish to declare 'time out' and stop all development, such effect, by whatever means achieved, would be constitutionally impermissible.").

[11] In support of summary judgment on the substantive due process claim, the individual Defendants argue that they are entitled to qualified immunity. Because the court has held that the facts, even in the light most favorable to the Corneals, do not constitute a violation of substantive due process, the court need not address whether the individual Defendants are entitled to qualified immunity. *See Saucier v. Katz*, 533 U.S. 194, 201, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (1985) (holding that the first step in analyzing a claim of qualified immunity is to determine whether the alleged right is constitutionally recognized).

In response to Defendants' initial motion for summary judgment, the court denied that motion, holding that "there is a material issue of fact as to Defendants' motives." *Corneal v. Jackson Township*, No. 1: CV-00-1192, memo, at p. 22 (M.D. Pa. Dec. 23, 2002) (citing portion of opinion denying summary judgment as to the Corneals' substantive due process claim). The court went on to state, "Resolution of this issue is imperative. If Defendants' motivation was not improper, then the Corneals cannot establish the first element of a civil conspiracy." *Id.* Thus, the court's decision to deny summary judgment was premised on its decision that there was a material issue of fact regarding the Corneals' substantive due process claim.

Because the court has now vacated that decision and held that Defendants' actions did not constitute a violation of due process, the Corneals' claim in Count II must fail as well. The Corneals have failed to adduce evidence from which a reasonable fact finder could determine that the individual Defendants committed an unlawful act or committed a lawful act for an unlawful purpose. Accordingly, the court will grant summary judgment in favor of the individual Defendants as to this claim.

c. Pennsylvania Constitutional Claims

In Count IV, the Corneals allege various violations of the Pennsylvanian Constitution. *See* Pa. Const. Art. I, §§ 1, 17, and 26.[12] In response to Defendants' initial motion for

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[12] Article I, Section 1 of the Pennsylvania Constitution provides, in relevant part: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are ... acquiring, possessing and protecting property ...." Section 17 states: "No ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed." Finally, Section 26 states: "Neither the Commonwealth nor any

summary judgment as to these claims, the court made various findings. First, the court held that a private right of action for monetary damages exists for violation of the Pennsylvania Constitution. Second, the court held that PSTCA does not bar such claims against local governments. Third, the court held that Pennsylvania's due process protections are co-extensive with those protections guaranteed pursuant to the Fourteenth Amendment to the United States Constitution. Finally, because the court held there was a genuine issue of fact as to whether Defendants violated the Corneals' substantive due process rights under the United States Constitution, the court held that an identical issue existed with respect to the claim pursuant to the Pennsylvania Constitution. The court has now held that Defendants are entitled to summary judgment on the Corneals' substantive due process claim under the United States Constitution. *See supra* at Part II.A.2.a. Therefore, the court must make the same ruling as to the Corneals' claim for violation of the Pennsylvania Constitution. Accordingly, the court will grant summary judgment in favor of Defendants on Count IV.

B. Motion for Reconsideration

1. Legal Standard

The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). Accordingly, a judgment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of

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political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."

law or fact or to prevent manifest injustice. *Max's Seafood Cafe by Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999) (citing *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995).) "'A motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of or as an attempt to relitigate a point of disagreement between the Court and the litigant.'" *Ogden v. Keystone Residence*, 226 F. Supp. 2d 588, 606 (M.D. Pa. 2002) (quoting *Abu-Jamal v. Horn*, 2001 U.S. Dist. LEXIS 20813, No. CIV. A. 99-5089, 2001 WL 1609761, at *9 (E.D. Pa. December 18, 2001) (citations and internal quotation marks omitted)).

2. Application

In Count III of their amended complaint, the Corneals claim that the individual Defendants intentionally interfered with the Corneals' contractual relationship with the Buyers. The individual Defendants moved for summary judgment, arguing that the Corneals failed to adduce sufficient evidence to prove that the individual Defendants intended to harm the contractual relationship between the Buyers and the Corneals. The court granted that motion. In doing so, the court stated the following:

> In this case, the Corneals contend that Newton, acting alone or in concert with the other Defendants, informed the Buyers that the subdivision plan would not be approved and that no permits for the development of the tract would be granted. Even if the Corneals could show that this in fact occurred, Newton is no longer a party to this action. Thus, in order to recover, the Corneals would have to demonstrate some sort of nexus between Newton's actions and Defendants. It is clear that the Corneals have failed to adduce any

> such evidence. The Corneals cite the fact that Newton and the Buyer's attorney shared an office and a common secretary. Even if Newton did tell the Buyer's attorney to extinguish their contract with the Corneals, there is no evidence indicating that he did so at the behest of Defendants. In short, nothing in the record connects Newton's actions, whatever they may have been, to any of the individual Defendants.

(Initial Summary Judgment Memo. at 25.)

The Corneals contend that this holding constitutes an error of law. Disregarding the fact that there is no evidence of a connection between Newton's actions and any of the individual Defendants, the Corneals argue that the court erred by failing to consider other evidence regarding Defendant Wilson's motive for interfering with the contract and his knowledge of the contract's existence. However, without a connection between Newton and any of the individual Defendants, Newton's actions cannot be considered as part of the individual Defendants' alleged plan to sabotage the Corneals' land contract. The evidence does not even establish "a wink and a nod" connection between Newton's actions and the individual Defendants.

Thus, to find in favor of the Corneals on this claim, a jury would have to conclude that the individual Defendants' imposed the land development moratorium and permit decisions to frustrate the Corneals' attempt to sell off a portion of their tract. That is, the court would have to conclude that the destruction of the Corneals' contractual relationship with the Buyers was a foreseeable consequence of Defendants' land use decisions. No reasonable jury, however, could come to this conclusion based on evidence that a single member of the Board knew of the contract, that his company had performed some percolation tests for the

Corneals, and that his grandfather owned the Corneals' property over thirty years ago. Tellingly, there is no evidence that Defendant Wilson knew that the Corneals and the Buyers were scheduled to settle on June 30, 2000 or that any Defendant knew that the Buyers had revoked the contract when the Board enacted the subdivision ordinance in July of 2000. Such evidence would be necessary to prove that Defendants' actually intended to undermine the Corneals' contract through the imposition of land use regulations and would likewise go a long way in establishing that the moratorium was a pretext for frustrating the Corneals' contractual relationship with the Buyers. However, the Corneals have presented no such evidence.

Because there was no genuine issue of material fact regarding the Corneals' claim for intentional interference with contract, the court granted summary judgment in favor of Defendants. On reconsideration, the Corneals have not demonstrated that the court committed a clear error of law in coming to this conclusion. Accordingly, the court will deny the Corneals' motion.

IV. CONCLUSION

As stated above, in light of the Third Circuit's decision in *United Artists Theatre Circuit v. Township of Warrington,* the court will grant summary judgment in favor of Defendants' on the Corneals' substantive due process claim in Count I and their remaining claims in Counts II and IV. Additionally, the court will deny the Corneals' motion for reconsideration of the court's order granting summary judgment as to their claim in Count III for intentional interference with contractual relations. An appropriate order will issue.

s/Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: July 28, 2003.

ORDER

In accordance with the accompanying memorandum of law, **IT IS HEREBY ORDERED THAT:**

(1) Defendants' renewed motion for summary judgment on Plaintiffs' substantive due process claim in Count I, and on Counts II and IV is **GRANTED;**

(2) Plaintiffs' motion for reconsideration of that portion of the court's order of December 23, 2002 which granted summary judgment in favor of Defendants' on Count III is **DENIED;** and

(3) As a result of this memorandum and order, in addition to that portion of this court's memorandum and order dated December 23, 2002 which was not vacated, the Clerk of Court shall enter judgment in favor of Defendants and against Plaintiffs on Counts I, II, III and IV and to close the case file.

s/ Sylvia H. Rambo
Sylvia H. Rambo
United States District Judge

Dated: July 28, 2003.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DAVID B. CORNEAL and SANDRA Y. CORNEAL,	:	**CIVIL NO. 1:CV-00-1192**
Plaintiffs	:	
	:	
v.	:	
	:	
JACKSON TOWNSHIP, Huntingdon County, Pennsylvania, *et al.*,	:	
Defendants	:	

ORDER

The background of this order is as follows: Plaintiffs, David and Sandra Corneal ("the Corneals"), filed this case alleging the following: (1) violations of their rights pursuant to the Fifth and Fourteenth Amendments to the United States Constitution (Count I); (2) that Defendants engaged in a civil conspiracy in violation of Pennsylvania common law (Count II); (3) that Defendants intentionally interfered with the Corneals' contractual relations (Count III); and (4) that Defendants' actions violated the Pennsylvania Constitution (Count IV). Upon the conclusion of discovery, the parties filed cross-motions for summary judgment.

By an order dated December 23, 2002, the court denied Plaintiffs' motion for summary judgment, but granted, in part, Defendants' motion for summary judgment. Specifically, the court granted summary judgment in favor of Defendants' on Plaintiffs' procedural due process claim in Count I, in addition, to Plaintiffs' state law claim in Count III. The court, however, denied Defendants' summary judgment motion as to Plaintiffs' substantive due process

claim in Count I, in addition to Plaintiffs' state law claims in Counts II and IV.[1]

As to Plaintiffs' substantive due process claim in Count I, the court, relying on *DeBlasio v. Zoning Bd. of Adjustment for the Township of West Amwell*, 53 F.3d 592 (3d Cir. 1995) and *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667 (3d Cir. 1991), held that a material issue of fact existed as to whether Defendants blocked Plaintiffs' land development plans because Defendants did not like Plaintiffs. On January 14, 2003, the United States Court of Appeals for the Third Circuit issued an opinion overturning *DeBlasio* and *Midnight Sessions*. *See United Artists v. Township of Warrington*, 316 F.3d 392, 401 (3d Cir. 2003). The court also held that in addressing substantive due process claims in the context of challenges to land use decisions, district courts should apply the "shocks the conscience" test instead of an "improper motive" test. *See id.* at 400 (citing *County of Sacramento v. Lewis*, 523 U.S. 833 (1998)).

Because the court in the instant matter applied *DeBlasio's* improper motive test in resolving Plaintiffs' substantive due process claim, the court's decision is no longer valid. However, it is not entirely clear whether Plaintiffs' claim would satisfy the "shocks the conscience" test. As a result, the court will vacate that portion of its December 23, 2002, order which denied Defendants' motion for summary judgment. Additionally, the court will require that the parties re-brief the substantive due process issue in light of the *United Artists* case.

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[1] The court's rulings as to Counts II (civil conspiracy) and IV (Pennsylvania Constitution) were conditioned on the court's holding that a material issue of fact existed as to Plaintiff's claim for violation of substantive due process. *See Corneal v. Jackson Township*, No. CV:00-1192, slip op. at 22-23 and 30-31 (M.D. Pa. Dec. 23, 2002).

Accordingly, **IT IS HEREBY ORDERED THAT**:

(1) The portion of the court's order of December 23, 2002 which denied Defendants' motion for summary judgment is **VACATED**;

(2) No later than April 1, 2003, Plaintiffs shall file a renewed motion for summary judgments regarding Plaintiffs' substantive due process claim and Plaintiffs' state law claims in Counts II and IV;

(3) The court reserves its ruling with regard to Defendants' motion *in limine* and Plaintiffs' motion for reconsideration;

(4) Plaintiffs' motion to compel compliance with pretrial procedures and Defendants' motion for reconsideration are **DEEMED MOOT**; (5) The pretrial conference, currently scheduled for March 27, 2003 at 11 a.m., is **CANCELED**; and

(6) Jury selection, currently scheduled for April 7, 2003 at 9 a.m. is **CANCELED**.

s/Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: March 18, 2003.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DAVID B. CORNEAL and SANDRA Y. CORNEAL,	:	**CIVIL NO. 1:CV-00-1192**
Plaintiffs	:	
	:	
v.	:	
	:	
JACKSON TOWNSHIP, Huntingdon County, Pennsylvania, *et al.*,	:	
Defendants	:	

MEMORANDUM

Before the court are cross-motions for summary judgment in the instant action. The parties have briefed the issues, and the matters are now ripe for disposition.

I. BACKGROUND

A. Facts

Plaintiffs, David and Sandra Corneal ("the Corneals"), filed this case alleging the following: (1) violations of their rights pursuant to the Fifth and Fourteenth Amendments to the United States Constitution (Count I); (2) that Defendants engaged in a civil conspiracy in violation of Pennsylvania common law (Count II); that Defendants intentionally interfered with the Corneals' contractual relations (Count III); and (4) that Defendants' actions violated the Pennsylvania Constitution (Count IV). Defendants in this action include the following: (1) Jackson Township, Pennsylvania; (2) W. Thomas Wilson; (3) Michael Yoder; (4) Ralph Wiler; (5) Ann L. Wirth, Jackson

Township Secretary; (6) David Van Dommelen, a building permit officer for Jackson Township; and (7) Barry Parks, Sewage Enforcement Officer for Jackson Township. Defendants Wilson, Yoder, and Wiler are members of the Jackson Township Board of Supervisors ("the Board").[1] The court has subject matter jurisdiction over this action based on 28 U.S.C. §§ 1331 and 1367. The following facts are undisputed unless otherwise noted.

In 1998, the Corneals, who reside in State College, Pennsylvania, acquired a ninety-five acre tract of land located in Jackson Township, Huntingdon County, Pennsylvania. The property had previously been part of the estate of Defendant Wilson's grandfather. The Corneals planned to subdivide and sell a portion of the tract. The Corneals believed that Jackson Township ("the Township") had to approve their subdivision plan. In order to assist them in obtaining approval from the Township, the Corneals had the tract surveyed and prepared a subdivision plan. The Corneals also hired Defendant Parks, the Township's Sewage Enforcement Officer, to test the tract for its suitability for an on-site septic system. Defendant Parks located suitable sites on the tract. After identifying the suitable septic sites, the Corneals hired Defendant Wilson's private firm, Eagle Construction, to conduct percolation tests. The tests were successful, and the Corneals paid Eagle Construction for its

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[1] By an order dated March 29, 2001, the court dismissed Defendant Larry Newton, Jackson Township Solicitor, from this action. By order dated October 18, 2001, the court granted Plaintiffs' motion for leave to amend the complaint. However, the court made clear that "there should be no confusion as to Defendant Newton.... [T]he only matter pending before the court is whether Plaintiffs should be granted leave to amend their complaint so as to separately plead its state law cause of action against the remaining Defendants." Thus, "Newton is no longer a party to this suit." In fact, Newton was not served with the amended complaint. Yet, Plaintiffs continue, in error, to list Newton as a Defendant in their amended complaint.

services. At the time Defendant Wilson's firm performed the percolation tests, the Township was not considering enacting a moratorium on land use subdivision.

During August and September of 1999, the Corneals decided to subdivide the tract into three separate lots. They prepared a subdivision plan and marketed one of the lots, a twenty-five acre tract, on which sat a house and a barn. On October 7, 1999, the Corneals entered into a contract to sell the tract for $150,000 to John Hewett, Jr. and Joann Smith ("the Buyers"). In accordance with the contract's terms, the Buyers submitted a down payment of $4,000 and agreed to pay $500 per month against the purchase price until settlement; which was scheduled for June 30, 2000.

During this period, Jackson Township did not have a subdivision ordinance to govern the development of land within the township.[2] However, at a Board meeting in January 2000, the Board, by unanimous vote, decreed a temporary moratorium on new development, subdividing, and conveyance pending the enactment of a formal ordinance governing subdivision and land development. The moratorium was not enacted pursuant to a resolution or any other formal action. It merely appeared in the meeting's minutes. Besides its appearance in the meeting minutes, no other documents exist relating to the moratorium.[3]

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[2] Huntingdon County has a Land Development Guide ("the Guide"). However, the Guide is not an ordinance pursuant to the provisions of the Municipalities Planning Code ("MPC"). *See* 53 Pa. Cons. Stat. § 10101, *et seq.*

[3] Although Defendants deny that the moratorium was enacted without formal action, they proffer no support for their denial. (See Defs. Resp. to Pls. Stat. Mat. Facts. at ¶ 45.) Moreover, the only statement on the record regarding this issue was made by Defendant Wirth. (See Wirth Depo. at 83, ¶¶ 19-21 ("Q: Was there some sort of a resolution or something indicating that the moratorium was being placed? A: No, it's only in the minutes.").) Finally, Defendants admit that, with the exception of the meeting minutes, no other document exists relating to the

The Corneals presented their original subdivision plan to the Board at the Township meeting in February of 2000. The plan indicated that the original ninety-five acre tract would be subdivided into three lots. On the largest of those lots, the Corneals planned to build their own home. The Corneals contend that they presented the plan to the Board because Defendant Wilson told Mr. Corneal that the subdivision plan required Board approval. (See Pls. Stat. Mat. Facts at ¶ 39.) Defendants deny this allegation. They contend that the Corneals' own agent, Mr. Simpson, told the Corneals that they were required to submit the subdivision plan to the Board. (See Defs. Resp. to Pls. Stat. Mat. Facts at ¶ 39.)

Because of the newly imposed moratorium, Defendants Wilson, Yoder, and Wiler refused to review the Corneals' subdivision plan. Within several days of the Township's refusal to review the plan, the Corneals submitted the plan to the County Planning Commission ("CPC"). The CPC reviewed the plan and, by way of a letter dated February 24, 2000, provided comments and recommendations. The CPC recommended that the Township deny approval of the plan in light of the Township's pending ordinance and moratorium against land development.

The Corneals revised the plan in hopes of receiving approval. They developed a new plan that reflected not three lots, but only two. One of these lots would be sold to the Buyers under the terms of their already existing contract with the Corneals. The other lot would contain the residual

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moratorium. (Defs. Resp. Pls. State. Mat. Facts at ¶ 51.) The court, therefore, finds that although there is a dispute of fact about this issue, that dispute is not genuine. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986) (holding that a factual dispute is "genuine" only if there is a sufficient evidentiary basis which would allow a reasonable fact-finder to return a verdict for the non-moving party).

amount of land, approximately sixty-nine acres, on which the Corneals would build a house, an art studio, and a garage. The Corneals submitted the revised plan to the CPC. On April 20, 2000, the CPC recommended conditional approval by the Township, pending adoption of the proposed land development ordinance. The CPC found that the revised plan appeared to conform to the proposed ordinance. Defendants Wilson, Yoder, and Weiler, however, refused to review the revised plan, citing the existence of the moratorium enacted a few months earlier.

Defendants, at various times throughout the Corneals' planning process, also refused to issue or approve other permits and applications. At a meeting in March of 2000, Defendants Wilson, Yoder and Weiler denied approval to sewage modules that Defendant Parks had approved. The Board of Supervisors cited the existing moratorium in support of its decision. Additionally, the Board denied the Corneals' request for a building permit to begin construction on the art studio. The Board indicated that it could not grant such a request because the sewer modules had not been approved. The Corneals then requested a privy permit, but the Board members instructed them that only Defendant Parks could issue such permits. Defendant Wirth then called Defendant Parks and instructed him not to issue any permits to the Corneals. That same evening, the Corneals contacted Defendant Parks to obtain the permit, and Defendant Parks told them that Defendant Wilson had barred him from issuing the permit. The Corneals then called Larry Newton, an attorney and Township Solicitor, to discuss the situation, but the Corneals did not receive a substantive response.

Wanting to begin developing the land, the Corneals constructed a one and a half (1.5) mile driveway through the tract. While constructing the driveway, the United States Army Corps of Engineers and the Commonwealth of Pennsylvania Department of Environmental Protection

approached the chosen contractor to investigate a complaint that the Corneals were violating wetlands regulations. The complaint was found to be without merit. Plaintiffs contend that Defendants Wilson and/or Defendant Wirth filed the complaint. (Pls. Br. in Sup. Mot. for Sum. J. at 5.)

Next, the Corneals planned to build a garage. They contacted Defendant Van Dommelen, the Township's Building Permit Officer, to obtain an application for a building permit. Defendant Van Dommelen, however, refused to issue the permit because the Board had instructed him not to issue any permits to the Corneals. Defendant Van Dommelen even called Defendant Wilson, in Mr. Corneal's presence. During that conversation, Defendant Wilson told Defendant Van Dommelen: "don't you dare issue [David Corneal] a permit." (Wilson Depo. at 128, ¶¶ 4-15.) Defendant Van Dommelen, however, had granted every other building permit application submitted to him in 2000. (Van Dommelen Depo. at 103, ¶¶ 3-13.) Moreover, Defendant Wilson does not know of any other building permit that the Township has ever denied. (Wilson Depo. at 186, ¶¶ 8-14.) Although Defendant Van Dommelen never refused to provide any other person in the Township with a permit, he refused to even provide the Corneals with a permit *application*. (See Van Dommelen Depo. at 56, ¶¶ 2-25.) During his conversations, Defendant Van Dommelen referred to Mr. Corneal as a "trouble making yuppie from over the mountain." (*Id.* at 71, ¶¶ 18-24.) He used this term to describe Mr. Corneal because Mr. Corneal "just behaves like someone who wants to get their own way and his age group." (*Id.* at 73, ¶¶ 1-2.)

On May 1, 2000, the Corneals received a letter from the Buyers' attorney. The letter informed the Corneals that the Buyers had terminated the agreement to purchase the tract due to difficulties with the Township in obtaining subdivision approval. The Buyers also requested that their

down payment of $4,000 be refunded along with the $3,000 in payments ($500 per month) paid to the Corneals in expectation of the settlement date of June 30, 2002.[4]

The Corneals allege that after the Buyers pulled out of their contract to purchase the subdivided portion of the Corneals' land, Defendant Wilson's nephew approached Mr. Corneal about the possibility of purchasing the tract. (Pls. State. Mat. Facts at ¶¶ 171.) Defendant Wilson, however, contends that his nephew approached Mr. Corneal before he entered into a contract with the Buyers. (Defs. Resp. to Pls. Stat. Mat. Facts at ¶¶ 171.) In any event, the Corneals began construction without a permit from the Township in July 2000. In October 2000, the Township brought suit against the Corneals to enjoin the construction. The parties, however, settled that matter.[5]

B. Procedural History

On June 30, 2000, the Corneals filed the instant suit. In Count I, the Corneals claim that Defendants, acting under color of state law, deprived them of their clearly established right and privilege to own, use, dispose, and develop their property as protected by the United States Constitution. In Counts II through IV, the Corneals made claims for civil conspiracy, intentional interference with contractual relations, and violations of the Pennsylvania Constitution. On March 29, 2001, the court granted the Township's motion to dismiss Count III of the original complaint, regarding the claim of intentional interference with contractual relations.

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[4] The Corneals allege that Defendants intentionally informed the buyers about the situation. Amend. Compl. at ¶¶ 129 - 31. Newton and the Buyers' attorney work in the same office and share the same secretary.

[5] The Corneals concede that since the filing of this lawsuit on June 30, 2000, the Township has granted them all required permits necessary to begin development of the tract, including building permits, sewage permits, and a driveway permit.

However, the court refused to dismiss Count III as to the individual Defendants. Additionally, the court granted Newton's motion to dismiss him as a defendant in the case. The Corneals filed a motion for reconsideration on April 12, 2001, and an amended motion for reconsideration on July 27, 2001. On September 12, 2001, the court denied the motion for reconsideration. On October 18, 2001, however, the court granted Plaintiffs' leave to file an amended complaint. Plaintiffs filed an amended complaint on November 6, 2001. After the conclusion of discovery, the parties filed the cross-motions for summary judgment which are currently before the court.

II. LEGAL STANDARD: MOTION FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56 provides that summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A factual dispute is "material" if it might affect the outcome of the suit under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is "genuine" only if there is a sufficient evidentiary basis which would allow a reasonable fact-finder to return a verdict for the non-moving party. *Id.* at 249. The court must resolve all doubts as to the existence of a genuine issue of material fact in favor of the non-moving party. *Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir. 1985).

Once the moving party has shown that there is an absence of evidence to support the claims of the non-moving party, the non-moving party may not simply sit back and rest on the allegations in the complaint; instead, they must "go beyond the pleadings and by [their] own affidavits, or by the

depositions, answers to interrogatories, and admissions on file, and designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (internal quotations omitted). Summary judgment should be granted where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden at trial." *Id.*

The standards governing the court's consideration of Federal Rule 56(c) cross-motions are the same as those governing motions for summary judgment, although the court must construe the motions independently, viewing the evidence presented by each moving party in the light most favorable to the nonmovant. *Raymond Proffitt Found. v. United States Envtl. Prot. Agency*, 930 F. Supp. 1088, 1096 (E.D. Pa. 1996).

III. DISCUSSION

A. The Corneals' claim under 42 U.S.C. § 1983

In Count I of the amended complaint, the Corneals allege that they are entitled to recover from Defendants based on 42 U.S.C. § 1983. Section 1983 is a remedial provision that imposes liability on any person who "under color of any statute, ordinance, regulation, custom, or usage of any State" deprives another of "any rights, privileges or immunities secured by the Constitution or laws...." 42 U.S.C. § 1983. Section 1983 does not grant any substantive rights, but instead offers redress for the deprivation of already existing Constitutional or statutory rights. *Maine v. Thiboutot*, 448 U.S. 1, 5-6 (1980).

In this case, the Corneals allege that Defendants, by intentionally and arbitrarily preventing the Corneals from developing their land, violated the Corneals' procedural and substantive due process rights under the Fourteenth

Amendment to the United States Constitution. Both parties move for summary judgment, arguing that the undisputed facts in the case entitle them to judgment as a matter of law. Because the court finds that there is a genuine dispute of material fact regarding Defendants' motivations, the court will deny both motions.

1. Procedural Due Process

The Corneals contend that Defendants' actions violated their due process rights. There are two types of due process claims under the Fourteenth Amendment: procedural and substantive. The Supreme Court has developed a two-part test for examining procedural due process claims: "[T]he first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) (internal citations omitted); *see also Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 680 (3d Cir. 1991) ("To establish a cause of action for a violation of procedural due process, a plaintiff ... must establish that the state procedure for challenging the deprivation does not satisfy the requirements of procedural due process.").

Thus, procedural due process claims, to be valid, must allege state sponsored deprivation of a protected interest in life, liberty, or property. *See Zinermon v. Burch*, 494 U.S. 113, 125 (1990). If such an interest has been, or will be deprived, procedural due process requires that the governmental unit provide the individual with notice and reasonable opportunity to be heard. *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d at 680 (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)).

In the context of land use decisions, the Third Circuit has stated that a state provides adequate procedural due

process when it "affords a full judicial mechanism with which to challenge the administrative decision in question." *DeBlasio v. Zoning Bd. of Adjustment for the Township of West Amwell*, 53 F.3d 592, 597 (3d Cir. 1995) (quotations omitted) (affirming dismissal of procedural due process claim arising out of zoning decision). Therefore, even if a municipal board makes a wrong decision that affects a plaintiff's protected property interest, no procedural due process claim lies unless no adequate judicial mechanism exists for challenging the decision. *See Bello v. Walker*, 840 F.2d 1124, 1128 (3d Cir. 1988).

In this case, the Corneals' claim arises out of the Board's refusal to issue them building and sewage permits and the Board's adoption of a moratorium on subdivision pending the enactment of a zoning ordinance. However, the court finds that Pennsylvania provides a judicial mechanism to challenge these decisions. *See Bello*, 840 F.2d at 1128 ("Pennsylvania affords a full judicial mechanism with which to challenge the administrative decision to deny an application for a building permit."). Therefore, even if the decisions were not in accordance with Pennsylvania law, as the Corneals argue, they cannot constitute the basis of a procedural due process violation. As to the refusal to issue the requested permits, the Corneals could have appealed the Board's adverse decisions by filing an action in the Court of Common Pleas for Huntington County, Pennsylvania. *See* 53 Pa. Cons. Stat. § 11002-A (granting jurisdiction to court of common pleas over all appeals from all land use decisions). Likewise, the Corneals could have appealed the Board's decision to enact the moratorium by filing an action in the same court.[6] *See* 53 Pa. Cons. Stat. § 66601(f) ("Any person

[6] The Corneals argue that the Township lacked the authority to enact the moratorium and that their actions in doing so "effectively deprived the Corneals of the use and enjoyment of their property." (Pls. Br. in Sup. Mot. for Sum. J. at 15.) The court construes this as an argument that the

aggrieved by the adoption of any ordinance may make complaint as to the legality of the ordinance to the court of common pleas."). Because Pennsylvania afforded the Corneals a full judicial mechanism to challenge the Board's allegedly illegal actions, the Corneals procedural due process claim fails as a matter of law.

2. Substantive Due Process

To recover under a claim for violation of substantive due process, the plaintiff must allege that the government deliberately and arbitrarily abused its power. In addressing such a claim, "[A]llegations that the government's actions in a particular case were motivated by bias, bad faith, or improper motive, such as partisan political reasons or personal reasons unrelated to the merits of the plaintiffs' application, may support a finding of substantive due process violation." *Midnight Sessions*, 945 F.2d at 683.

Thus, to maintain their claim for violation of their substantive due process rights, the Corneals must first show that the Township acted to infringe a property interest worthy of protection under substantive due process. *DeBlasio*, 53 F.3d at 598 (citing *Ersek v. Township of Springfield*, 822 F. Supp. 218, 220 (E.D. Pa. 1993 1994)). The Third Circuit, in *DeBlasio*, concluded that mere ownership of property subject to a local land use regulation is a property interest entitled to substantive due process protection. 53 F.3d at 600. Thus, where, as here, a "governmental decision ... impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or

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allegedly ultra vires action of enacting a moratorium constituted a violation of the Corneals' right to procedural due process. As stated above, however, that claim is legally insufficient because Pennsylvania provided the Corneals an judicial mechanism for appealing the moratorium. *See* 53 Pa. Cons. Stat. Ann. § 66601.

she alleges that the decision limiting the intended use of the land was arbitrarily or irrationally reached." *Id.* at 601.

In *DeBlasio*, the court addressed virtually the same issue as is currently before the court. In that case, a property owner owned an industrial hut situated in West Amwell Township, New Jersey on which he operated an auto body repair shop. *Id.* at 594. In the mid 1960s, West Amwell enacted a zoning ordinance which declared the hut's area as a minimum residential use district. Because the hut's use as an auto body shop predated the enactment of the zoning ordinance, the hut received an exemption from the new zoning ordinance. In 1979, DeBlasio purchased the land on which the hut was located. *Id.* He then leased the property to Interstate Battery Systems. That entity operated a small battery distribution business out of the hut. The business continued for about ten years without interference from West Amwell officials. In 1989, however, the Township's zoning official, acting on a citizen complaint, found that the operation of the battery business constituted an expansion of the pre-existing nonconforming use. *Id.* at 595. Eventually, DeBlasio appealed that decision to West Amwell's Zoning Board of Adjustment ("ZBA"). Alternatively, he requested a variance if the ZBA determined that the property was not in compliance. The ZBA upheld the zoning official's finding and subsequently denied DeBlasio's request for a variance. *Id.* at 596.

DeBlasio then filed a § 1983 action, alleging, amongst other claims, that the ZBA's actions constituted a violation of his right to substantive due process. On appeal, the Third Circuit reversed the District Court's granting of West Amwell's motion for summary judgment as to DeBlasio's substantive due process claim. The Circuit Court found that a material issue of fact existed as to whether the ZBA, although ostensibly acting within their authority, acted on the basis of an improper motive. In making this finding,

the Third Circuit highlighted the existence of evidence indicating that the ZBA's secretary, Werner Hoff, may have acted to benefit himself or members of his immediate family. *Id.* at 601-02. Specifically, the court noted that there was evidence indicating that Hoff approached Interstate's manager a few months before the zoning officer began his investigation into the use of the hut. During that conversation, Hoff told Interstate's manager that he should purchase or rent property that Hoff owned because DeBlasio's property was not in conformance with West Amwell's zoning ordinance. During the first set of hearings before the ZBA, Hoff recused himself. However, during the proceedings in which the ZBA ultimately upheld the zoning officer's determination and denied DeBlasio's request for a variance, Hoff participated despite his earlier refusal to do so. Moreover, the zoning officer testified that Hoff implored him to issue more violations to DeBlasio. *Id.* at 595 n.2. Based on this evidence, the Third Circuit determined that a material issue of fact existed as to whether Hoff, for personal reasons, improperly interfered with the process by which the ZBA issued zoning decisions. Thus, the District Court's granting of summary judgment in favor of the defendants constituted reversible error.

Based on this holding, the court finds that the Corneals have stated a valid substantive due process claim. They are property owners who allege that Defendants impinged on their right to develop their property through regulations whose motivation was personal, not governmental. Therefore, resolution of the current motion turns on whether the Corneals have adduced sufficient evidence to create a material question of fact as to whether the Township and its employees deliberately and arbitrarily abused their power. That is, whether their "actions ... were motivated by bias, bad faith, or improper motive, such as

partisan political reasons or personal reasons." *See Midnight Sessions*, 945 F.2d at 683.

It is undisputed that Defendant Van Dommelen referred to Mr. Corneal as a "trouble making yuppie" and that Van Dommelen had never before denied an application for a permit until he denied Mr. Corneals' application. (Van Dommelen Depo. at 71, ¶¶ 18-24.) Further, Defendant Wilson told Van Dommelen "don't you dare issue [David Corneal] a permit." (Wilson Depo. at 128, ¶¶ 4-15.) In addition, Plaintiffs argue that Defendant Wilson filed a frivolous complaint with the Department of Environmental Protection and the U.S. Army Corps of Engineers, claiming wetlands violations on the Corneals' property. Based on this evidence, it appears that there is a material issue of fact as to whether Defendants blocked the Corneals' land development plans as a matter of land use policy or because they simply did not like Mr. Corneal and wanted to keep such a "trouble making yuppie" from erecting a home in the Township or from subdividing his property. Put simply, even if Defendants were authorized to enact a land development moratorium, they could not do so because they disliked Mr. Corneal or wished to spite him in some manner. *See Midnight Sessions*, Ltd., 945 at 683.

At the very least, Defendants' motives are unclear, and cannot be determined as a matter of law. Determinations as to a party's motivations, like those necessary to resolve the instant matter, are within the province of the jury, not the court. *See Id.* (citing *Bello*, 804 F.2d at 1130). The court, therefore, will deny both parties' motions for summary judgment.

3. Qualified Immunity

Defendants argue that, regardless of whether there is a material issue of fact regarding the Corneals' due process claim, the court should still grant summary judgment in favor

of Defendants because they are entitled to qualified immunity for their actions. "Qualified immunity is an 'entitlement not to stand trial or face the other burdens of litigation.'" *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). The longstanding rule on qualified immunity is that "officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

In order to determine whether a right is clearly established, the court must first determine whether the alleged right is constitutionally recognized at all. *Saucier*, 533 U.S. at 201; *Siegert v. Gilley*, 500 U.S. 226, 231 (1991); *Brown v. Grabowski*, 922 F.2d 1097, 1110 (3d Cir. 1990). If the facts do not allege such a violation, no further inquiries are necessary. *Saucier* at 201. If, on the other hand, the court finds that the plaintiff has alleged violation of a recognized right, then the court must determine whether it would be clear to a reasonable person that his conduct was unlawful in the situation he confronted. *Harlow*, 474 U.S. at 818; see also *Wilson v. Layne*, 526 U.S. 603, 615 (1999) ("[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established."). Further, when determining whether a right was clearly established, a court must look at the law at the time of the event. *See Harlow*, 457 U.S. at 818.

The Third Circuit has determined that in order for a right to be clearly established, there need not be a similar case directly on point. Rather, the test is whether "some but not precise factual correspondence to precedent" was available to the government official such that she may be charged with knowledge of the illegality of her actions.

Good v. Dauphin County Social Services, 891 F.2d. 1087, 1092 (3d Cir. 1989) (citing *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 726 (3d Cir. 1989)); *see also People of Three Mile Island v. Nuclear Regulatory Comm'rs*, 747 F.2d 139, 144 (3d. Cir 1984).

In this case, the court finds that Defendants are not entitled to qualified immunity based on the law in effect at the time of the actions in question. The Third Circuit issued the *DeBlasio* decision in 1995; four years before any of the events in the instant matter took place. That case made it clear that land use decisions impinging upon a landowner's development of his property violate the landowner's substantive due process rights where such decisions are arbitrarily or irrationally reached. 53 F.3d at 601. That case also made clear that a cause of action lies in such a case, even where the land use decision was not prohibited by law. *Id.* Thus, the court finds that, although not a factual carbon copy of the Corneals' situation, the *DeBlasio* decision is sufficiently analogous for the court to find that its holding evidenced that the Corneals had a clearly established right. Qualified immunity, therefore, is unavailable to Defendants in this case.

Defendants, however, hang their entire argument for qualified immunity on the fact that they believed that the Township was permitted to enact a temporary moratorium.[7] Thus, according to Defendants, their decisions to not issue

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[7] In support of this proposition, Defendants cite *Naylor v. Township of Hellam*, 717 A.2d 629 (Pa. Commw. Ct. 1998). In that case, the Commonwealth Court held that municipalities may enact temporary moratoriums on land development to halt development while the municipality amends its land use ordinance. *Id.* at 633. The Supreme Court of Pennsylvania, however, overruled that decision in *Naylor v. Township of Hellam*, 773 A.2d 770, 776-77 (Pa. 2001) ("However much a rapidly expanding municipality may wish to declare 'time out' and stop all development, such effect, by whatever means achieved, would be constitutionally impermissible.").

permits to the Corneals flowed directly from a permissible action. *DeBlasio*, however, made it perfectly clear that even where a municipality is ostensibly acting within its rightful authority, a substantive due process violation is established if the plaintiff demonstrates that "the decision limiting the intended land use was arbitrarily or irrationally reached." *Id.* Accordingly, the mere fact that Defendants may have been authorized to issue temporary land moratoria at all times relevant to this litigation, does not entitle them to qualified immunity where there is a material issue of fact as to their motivation for taking such action.

4. Legislative Immunity

Defendants Wilson, Yoder, and Wiler also claim that they are entitled to legislative immunity, as the Township's Board members, insofar as the Corneals' claim arises out of the enactment of land development moratorium. The proponent of a claim to absolute immunity to a § 1983 action bears the burden of establishing the justification for such immunity. *Antoine v. Byers & Anderson*, 508 U.S. 429, 432 (1993). The Third Circuit has held that members of local legislative bodies are entitled to legislative immunity for actions taken in a purely legislative capacity. *Ryan v. Burlington County, New Jersey*, 889 F.2d 1286, 1290 (3d Cir. 1989); *Aitchison v. Raffiaini*, 708 F.2d 96, 98-99 (3d Cir. 1983). Courts apply a two-prong test to determine whether a government official's actions are to be regarded as legislative for immunity purposes. First, the action must be "substantively legislative" in that it requires a policy-making or line-drawing decision. Second, the decision must be "procedurally legislative" in that it must be undertaken through an established legislative process. *Ryan*, 889 F.2d at 1290-91.

In this case, it cannot reasonably be disputed that the enactment of the land development moratorium was

substantively legislative. The enactment reflects an important policy decision that halting development until the enactment of a subdivision plan was necessary pending adoption of the proposed subdivision ordinance. The minutes of the meeting reflect that although Huntington County was offering to draft boiler plate subdivision ordinances, "Jackson Township had already put a lot time into the proposed [subdivision] ordinance and it was felt that it was in the best of interest of the Township to proceed with the ordinance that the Supervisor's have decided on." (Defs. Mot. for Sum. J., Ex. 7.)

Although the court has no problem concluding that this action was substantively legislative, it is not persuaded that the moratorium was enacted according to an established legislative procedure. The moratorium is simply reflected in the meeting minutes. Pennsylvania law establishes a strict series of requirements for the enactment of an ordinance by the supervisory boards of second class townships, like Jackson Township. *See* 53 Pa. Cons. Stat. § 66601(a). Amongst the requirements for a valid ordinance, the township must first publish any proposed ordinance in a local newspaper at least once and at least seven days before enacting the ordinance. *Id.* These publication requirements are mandatory, rendering void all ordinances adopted in violation of these requirements. *See Lower Gwynedd Township v. Gwynedd Props., Inc.*, 591 A.2d 285, 287 (Pa. 1991). Moreover, all ordinances must be recorded in the township's ordinance book. *See* 53 Pa. Cons. Stat. § 66601(a). Like the publication requirements, the recording of the ordinance is mandatory and failure to do so renders an otherwise valid ordinance void ab initio. *See Cranberry Park Assocs. ex rel Viola v. Cranberry Township*, 751 A.2d 165, 167 (Pa. 2000). It is undisputed that the Board did not publish the proposed moratorium before enacting it, nor did

they record the ordinance in the ordinance book. Thus, the moratorium was not validly enacted.

Based on these facts, the court finds that legislative immunity is unavailable to the Board members in this case. Legislative immunity is designed to provide legislators with immunity "from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence, but for the public good." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). Thus, the court finds it would be incongruent to deem a procedurally defective legislative act as one undertaken through established legislative procedures. Accordingly, the court finds that the Board member Defendants are not entitled to legislative immunity for the enactment of the subdivision moratorium at issue in this case.

It is true that in *Acierno v. Cloutier*, 40 F.3d 597, 614 (3d Cir. 1994), the Third Circuit held that whether an act is procedurally legislative for purposes of legislative immunity does not turn solely on whether the legislators complied with the technical requirements for enacting legislation. Rather, courts are to focus their inquiry on whether there has been a "general adherence to legislative procedure." *Id.* In that case, the Third Circuit held that failure to properly title a notice of a proposed rezoning ordinance did not render the rezoning ordinance procedurally defective for purposes of legislative immunity. *Id.* at 615.

Acierno, however, is distinguishable from the instant matter. Crucial to its decision, the court stated, was the fact that there was "no indication in the record that members of the County Council bypassed state-mandated procedures in bad faith when enacting [the rezoning ordinance.]" *Id.* In the instant matter, on the other hand, there is a material issue of fact as to the motives behind the Board's actions. *See supra* at Part III.A.2. Additionally, there is substantial evidence indicating that the Board members, especially Defendant Wilson, interfered with the Corneals ability to

obtain sewage and building permits and that they attempted to impede the Corneals' development plans by filing a complaint with the Army Corps of Engineers and the Commonwealth's Department of Environmental Protection. *Id.* Moreover, the Third Circuit, in *Acierno* cited, as evidence of a lack of bad faith, the fact that the County Council "followed the ordinance procedure, published notice of its intended action, and held appropriate public hearings before enacting the rezoning ordinance." 40 F.3d at 615. In the instant matter, however, Defendants complied with none of these requirements, even though failure to do so would render their actions null and void pursuant to Pennsylvania law.[8]

Therefore, the court finds that the moratorium was not enacted pursuant to an established legislative procedure. Because the Board's actions were not procedurally legislative, its members are not entitled to legislative immunity in this case.

B. State Law Claims

1. State Law Civil Conspiracy

In Count II, the Corneals claim that Defendants' actions constituted a civil conspiracy. Under Pennsylvania law, in order to recover for civil conspiracy, three elements must be proven: (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage. *McKeeman v. Corestates Bank, N.A.*, 751 A.2d 655, 660 (Pa. Super. Ct. 2000).

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[8] Although the Board published the fact that it was going to have a meeting in January of 2000, none of its members could remember if that publication listed, as required, that the Board would be considering enacting a moratorium on all land development in Jackson Township.

The Corneals move for summary judgment arguing that the undisputed facts indicate that they are entitled to judgment as a matter of law. As with its finding regarding their substantive due process claim, the court finds that there is a material issue of fact as to Defendants' motives. *See supra* at Part III.A.2. Resolution of this issue is imperative. If Defendants' motivation was not improper, then the Corneals cannot establish the first element of a civil conspiracy. Accordingly, the court will deny the Corneals' motion for summary judgment as to Count II.

Defendants, on the other hand, argue that they are entitled to summary judgment because there is no evidence indicating that they committed an unlawful act. However, there is a material issue of fact regarding whether Defendants violated the Corneals' substantive due process claims. *See Id.* The court, therefore, cannot say that Defendants did not act unlawfully.

However, as far as the Corneals assert a cause of action against the Township for civil conspiracy, it is clear that such a claim is barred by the Pennsylvania Subdivision Torts Claim Act ("the PSTCA"). *See* 42 Pa. Cons. Stat. § 8541, *et seq.* The PSTCA provides that "[e]xcept as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." *Id.* "Th[e] immunity [also] extends to an employee of the [Township] who is liable for civil damages caused by acts which are within the scope of his office or duties." *Renk v. City of Pittsburgh*, 641 A.2d 289, 292 (Pa. 1994). However, the PSTCA limits the immunity of employees by providing that, in a situation where an "employee['s] ... act ... caused the injury and ... such act constituted a crime, actual fraud, actual malice, or willful misconduct," immunity shall not apply. 42 Pa. Cons. Stat. § 8550; *see also Sameric Corp. of*

Delaware, Inc. v. City of Philadelphia, 142 F.3d 582, 600 (3d Cir. 1998); *Renk*, 641 A.2d at 292; *Robbins v. Cumberland County Children & Youth Servs.*, 802 A.2d 1239, 1252 (Pa. Commw. Ct. 2002). This willful misconduct exception eliminates a municipal employee's immunity, but not the municipality's immunity. *City of Philadelphia v. Glim*, 613 A.2d 613, 617 (Pa. Commw. Ct. 1992).

Because civil conspiracy is, by definition, an intentional tort, the Corneals' claim against the municipality is barred, while the claim against the individual Defendants is not. *See Renk*, 641 A.2d at 293 ("In other words, the term 'willful misconduct' is synonymous with the term 'intentional tort.'").

Accordingly, the court will deny the Corneals' motion for summary judgment as to Count II of the amended complaint. The court, however, will grant, in part, Defendants' motion for summary judgment as to Count II. Specifically, the court will grant the motion as to Defendant Jackson Township. The court, however, will deny the motion as to the other Defendants.[9]

2. Intentional Interference with Contractual Relations

In Count III, the Corneals claim that Defendants intentionally interfered with the Corneals' contractual relationship with the Buyers. In order to recover for this claim, the Corneals must prove the following: (1) the existence of a contractual relationship; (2) an intent on the part of Defendants to harm the Corneals by interfering with their contractual relationship; (3) the absence of a privilege or justification for such interference; and (4) damages

[9] Although Defendant Jackson Township has not raised the PSTCA as a defense to Count II, as a matter of judicial economy, the court will not entertain claims at trial that are deficient as a matter of law.

resulting from Defendants' conduct. *See Triffin v. Janssen*, 626 A.2d 571, 574 (Pa. Super. Ct. 1993).

The Corneals argue that the loss of the Buyers' promise to buy resulted in damages in the amount of the contract. Defendants, on the other hand, argue that this claim is barred by the PSTCA. *See* 42 Pa. Cons. Stat. §8541, *et. seq.* Pursuant to its order of March 29, 2001, the court has already determined that the claims against the Township are barred by the PSTCA. For the reasons previously stated, the claim against the individual Defendants, however, is not barred. *See, supra*, Part III.B.1 (holding that the individual Defendants are not immune to suits based on their willful misconduct).

Like civil conspiracy, intentional interference with contractual relations is, by definition, an intentional tort. As such, the Corneals' claim against the municipality is barred, while the claim against the individual Defendants is not. *See Renk*, 641 A.2d at 293. Thus, only the Township may assert tort immunity in a claim of intentional interference of contractual relations, and the employees – as individual defendants without immunity for willful misconduct – will be found liable if the four-part test in *Triffin* is met.

Defendants alternatively argue that the Corneals' interference claim against the individual Defendants must fail because the Corneals have not adduced sufficient evidence to prove that the individual Defendants intended to harm the Corneals by interfering with their contractual relationship with the Buyers. In this case, the Corneals contend that Newton, acting alone or in concert with the other Defendants, informed the Buyers that the subdivision plan would not be approved and that no permits for the development of the tract would be granted. Even if the Corneals could show that this in fact occurred, Newton is no longer a party to this action. Thus, in order to recover, the Corneals would have to demonstrate some sort of nexus between Newton's actions

and Defendants. It is clear that the Corneals have failed to adduce any such evidence. The Corneals cite the fact that Newton and the Buyer's attorney shared an office and a common secretary. Even if Newton did tell the Buyer's attorney to extinguish their contract with the Corneals, there is no evidence indicating that he did so at the behest of Defendants. In short, nothing in the record connects Newton's actions, whatever they may have been, to any of the individual Defendants.

In summation, the Township is entitled to immunity on Count II pursuant to the PSTCA. Additionally, there is insufficient evidence connecting any of the individual Defendants to Newton's allegedly tortious interference. Accordingly, the court will grant Defendants' motion for summary judgment on Count II. Consequently, the court will deny the Corneals' motion for summary judgment as to this count.

3. State Constitutional Claims

a. A private right of action exists for monetary damages based on violation of the Pennsylvania Constitution.

In Count IV, the Corneals allege various violations of the Pennsylvanian Constitution. *See* Pa. Const. Art. I, §§ 1, 17, and 26.[10] Defendants argue that the court must grant

[10] Article I, Section 1 of the Pennsylvania Constitution provides, in relevant part: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are ... acquiring, possessing and protecting property...." Section 17 states: "No ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed." Finally, Section 26 states: "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any

summary judgment in their favor as these claims because, they contend, there is no private right of action for monetary damages for violation of the Pennsylvania Constitution. The Corneals concede that the Pennsylvania Supreme Court never has addressed the specific question of whether there exists a private cause of action for damages to remedy violations of the Declaration of Rights set forth in Article I of the Pennsylvania Constitution. (See Pls. Br. in Sup. Mot. for Sum. J. at 36.) The Corneals are correct. As discussed in *Robbins v. Cumberland County Children & Youth Services*, no cases exist to clarify "the difficult issue of whether there exists a direct right of action for money damages against government officials for violations of the Pennsylvania Constitution." 802 A.2d at 1251.

However, because many Pennsylvania courts have addressed claims based on violation of the Pennsylvania Constitution, without deciding whether a private right of action exists, the court finds that such a right does in fact exist. *See, e.g., Redevelopment Auth. v. Woodring*, 445 A.2d 724 (Pa. 1982). Moreover, Defendants, despite their insistence that this right is nonexistent, have not proffered a single case in which a court has refused to hear a claim based on violation of the Pennsylvania Constitution.

b. The PSTCA does not apply to the Corneals' claims for violation of the Pennsylvania Constitution.

Defendants alternatively argue that even if a direct cause of action exists under the Pennsylvania Constitution, the PSTCA serves as a bar for any state constitutional tort claims against the Township. The Corneals, however, cite a plethora of cases for the proposition that claims arising from violations of the Pennsylvania Constitution may be raised

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civil right."

against local governments. *Coffman v. Wilson Police Dep't*, 739 F. Supp. 257, 266 (E.D. Pa. 1990) (holding that claims against local governments based on violation of the Pennsylvania Constitution fall outside the purview of PSTCA which is, as its title suggests, limited to tort claims); *Redevelopment Auth. v. Woodring*, 445 A.2d 724 (Pa. 1982); *Thelin v. Borough of Warren*, 544 A.2d 1135 (Pa. Commw. Ct. 1988); *Williams v. City of Pittsburgh*, 531 A.2d 42 (Pa. Commw. Ct. 1988); *Holland Enters., Inc. v. Joka*, 439 A.2d 876 (Pa. Commw. Ct. 1982); *see also DeBartolo v. City of Philadelphia*, 159 F. Supp. 2d 795, 801 (E.D. Pa. 2002) (holding that claim against municipal employee based on violation of Pennsylvania Constitution not barred by PSTCA where violation arises from employee's intentional conduct). However, there are also cases in which courts have held that the PSTCA applies to claims brought against local governments for violations of the Pennsylvania Constitution. *See Agresta v. Goode*, 797 F. Supp. 399, 409 (E.D. Pa. 1992) (holding City of Philadelphia immune to suit for violation of Pennsylvanian Constitution, but individual city officials not immune); *Robbins*, 802 A.2d at 1252 (holding County Children and Youth Services immune to suit that they failed to protect a child from physical abuse inflicted by mother).

Thus, the court is faced with a dilemma of conflicting authority regarding whether the PSTCA applies to claims for violations of the Pennsylvania Constitution. The court finds that the better reasoned approach is to hold that it does not apply. In doing so, the court looks to the analogous provision for violations of the federal constitution. Under 42 U.S.C. § 1983, a municipality may be held liable where the action allegedly violating a federal right "implements or executes a policy statement, ordinance, or officially adopted policy." *Monnell v. Department of Soc. Servs.*, 436 U.S. 658, 690 (1978). The *Monnell* case rejected *respondeat superior* liability for the acts of a municipality's employees. Rather,

the "official policy" requirement makes clear "that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur v. Cincinnati*, 475 U.S. 469, 479-480(1986).

Thus, pursuant to § 1983, a municipality is liable for violations of federal rights only where such a right is violated as a result of municipal policy.[11] If the court were to hold, instead, that the PSTCA applied, a municipality would be immune from all claims based on violation of the Pennsylvania Constitution where the claims arose out of municipal employee's intentional conduct. Application of such a rule is especially absurd where, as in the present case, the state constitutional and federal constitutional standards are identical. *See infra* at Part III B.3.c (holding that the requirements of Article I, Section 1 of the Pennsylvania Constitution are identical to the procedural and substantive due process standards under the Fourteenth Amendment to the United States Constitution). Thus, if the court were to apply the PSTCA to the instant action, both the Township and the individual Defendants could be held liable for violation of the Corneals' substantive due process rights under their § 1983 claim. However, only the individual Defendants could be held liable for violation of the Pennsylvania Constitution's due process guarantee, even though both constitutions apply the same standard to determine whether a violation has occurred.

Although the PSTCA speaks only of municipal liability generally, it makes little sense to extend the PSTCA to cover alleged violations of constitutional rights where the legislature has not evidenced a clear intent to abrogate such fundamental rights. *See Coffman*, 739 F. Supp. at 266 (holding that "it would be peculiar if the legislature could

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[11] The Township does not contend that the individual Defendants' actions in this case do not constitute municipal policy for purposes of imposing liability on the Township under § 1983.

abrogate rights protected by the [Pennsylvania] Constitution"). The court, therefore, holds that the PSTCA does not apply to cases where a plaintiff asserts a claim for monetary damages against a municipality based on violations of the Pennsylvania Constitution. Accordingly, the PSTCA does not bar the Township's liability for the Corneals' claim based on violation of the Pennsylvania Constitution.[12]

c. There is a material issue of fact as to whether Defendants violated the Corneals' substantive due process rights under the Pennsylvania Constitution.

It is well established that the rights found in the Federal Constitution are the minimal that a state must provide to individuals. However, "each state has the power to provide broader standards and go beyond the minimum floor established by the federal Constitution." *Commonwealth v. Edmunds*, 586 A.2d 887, 894 (Pa. 1991) (quotations omitted). However, "the Pennsylvania Supreme Court has held that the requirements of Article I, Section 1 of the Pennsylvania Constitution are not distinguishable from those of the [Due Process Clause of the] 14th Amendment ... [thus] we may apply the same analysis to both claims." *Robbins*, 802 A.2d at 1253 (quoting *Pennsylvania Game Comm'n v. Marich*, 666 A.2d 253, 255 n.6 (1995) (internal quotations omitted)); *see also Plowman v. Department of Transp.*, 635 A.2d 124, 126 (Pa. 1993) (holding that the

[12] It is worth noting that even if the court were to hold that the PSTCA applied to the Corneals' claim, such a holding would not affect the outcome as to the individual Defendants. Even if the PSTCA applied, those Defendants would still be liable because the Corneals' claim arises out of the individual Defendants' intentional conduct. *See* 42 Pa. Cons. Stat. § 8550; *Sameric Corp.*, 142 F.3d at 600.

standards for substantive due process are identical under both the United States and Pennsylvania constitutions).

The court has previously held that there is a material issue of disputed fact as to whether Defendants violated the Corneals' right to substantive due process of law as guaranteed by the United States Constitution. *See supra* at Part III.A.2. However, the court has also determined that Defendants are entitled to judgment as a matter of law as to the Corneals' claim that Defendants violated the Corneals' procedural due process rights under the Federal Constitution. *See supra* at Part III.A.1. Because the Pennsylvania Constitution incorporates the federal standards as to these rights, the court finds that these holdings are equally applicable as to the Corneals' claims for violation of the Pennsylvania Constitution. That is to say, a genuine issue of material fact exists with respect to the claim of substantive due process. Defendants, however, are entitled to judgment as a matter of law as the Corneals' procedural due process claims.

IV. CONCLUSION

In accordance with the preceding discussion, the court will deny Plaintiff s motion for summary judgment. The court, however, will grant, in part, Defendants' motion for summary judgment. Because the full panoply of procedures existed for the Corneals to challenge the Township's moratorium, the claim of procedural due process violations, under both the United States and Pennsylvania Constitutions, must fail. However, because the intent and motives behind the moratorium cannot be determined as a matter of law, the claim of substantive due process presents a genuine issue of material fact. As for the state law claim for civil conspiracy, Defendants' motion for summary judgment is granted on behalf of the Township because government immunity exists for the Township under the PSTCA. The court, however,

will deny the individual Defendants' motion for summary judgment regarding the state civil conspiracy claim. Because Plaintiffs have failed to adduce sufficient evidence to maintain a claim for intentional interference with contractual relations, the court will grant Defendants' motion for summary judgment as to Count III. Finally, with respect to the state constitutional claims, Defendants' motion for summary judgment will be denied. An appropriate order will issue.

s/Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: December 23 , 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DAVID B. CORNEAL and SANDRA Y. CORNEAL,	:	**CIVIL NO. 1:CV-00-1192**
Plaintiffs	:	
	:	
v.	:	
	:	
JACKSON TOWNSHIP, Huntingdon County, Pennsylvania, *et al.*,	:	
Defendants	:	

ORDER

In accordance with the foregoing memorandum of law, **IT IS HEREBY ORDERED THAT:**

(1) Defendants' motion for summary judgment on Count I is **GRANTED in PART** and **DENIED in PART** as follows:

(A) Defendants' motion for summary judgment regarding the procedural due process claim is **GRANTED;**

(B) Defendants' motion for summary judgment regarding the substantive due process claim is **DENIED;**

(2) Defendants' motion for summary judgment on Count II is **GRANTED IN PART**. As the motion relates to Defendants Jackson Township, the motion is GRANTED. In all other respects, Defendants' motion for summary judgment on Count II is **DENIED;**

(3) Defendants' motion for summary judgment on Count III is **GRANTED;**

(4) Defendants' motion for summary judgment on Count IV is **GRANTED** with regard to the procedural due process claims, and **DENIED** with regard to the substantive due process claim;

(5) Plaintiffs' motion for summary judgment is **DENIED**.

s/Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: December 23 , 2002

NO. 04-63

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID B. CORNEAL AND SANDRA Y. CORNEAL,
Petitioners

v.

JACKSON TOWNSHIP, HUNTINGDON COUNTY, PENNSYLVANIA, ET AL.,
Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals for The Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the District Court and the Court of Appeals, by correctly employing this Honorable Court's stated precedent in a manner consistent with the other Circuits, properly determined that, as a threshold legal matter, the totality of the facts when viewed in the light most favorable to the Petitioners, failed to establish that Respondents' actions constitute an abuse of government power which "shocks the conscience" such that the Petitioners can sustain a substantive due process violation claim, where the record evidence demonstrates that the Respondents' actions were a matter of land use policy?

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COUNTERSTATEMENT OF THE CASE[1]

This matter arises from a dispute over local land use planning and local land use decisions. Petitioners, the Corneals, have asserted a substantive due process claim, as well as other state law claims, based on the Corneals' attempt to develop and subdivide a 95-acre tract of land. The Corneals never availed themselves of state law procedure to redress the Township's alleged interference with their land development plans. The undisputed material facts of record fail to demonstrate that any actions taken by the Township shocks the conscience sufficient to prove a substantive due process violation. To the contrary, the Supervisors, Township Secretary and the municipal ordinance officers did not act arbitrarily, but rather their actions were always a matter of a land use policy.

Contrary to Petitioners allegations, the District Court thoroughly recounted the facts of record and considered them, as it repeatedly stated, in the light most favorable to the Corneals. (App. 6a, 16a, 22a, 24a). Based on the undisputed facts of record and in accord with this Court's precedent, the District Court and the Court of Appeals properly determined that the Corneals failed to adduce facts from which a reasonable jury could conclude that the Board's actions were "wholly divorced from any rational and legitimate land use concerns." Therefore, the lower Courts properly concluded as a threshold matter that the Board's actions did not "shock the conscience."

Jackson Township is a second-class township of approximately 816 residents located in Huntingdon County, Pennsylvania, with an annual local tax base of approximately $22,000.00. (A649; A1144-45).[2] The Board of Supervisors of

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[1] As outlined below, Petitioners have ignored certain deposition testimony of Mr. Corneal's surveyor/engineer, David Simpson, Township Secretary, Ann Wirth and Township Solicitor, Newton. Nonetheless, Respondents reiterate that, "... a factual dispute is 'genuine' only if there is a sufficient evidentiary basis which would allow a reasonable fact-finder to return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

[2] In order to maintain the integrity of the Appellate record, Respondents refer to the Appendix submitted to the Third Circuit Court of Appeals as "A---". All references to the instant Appendix are stated as "App. –a."

Jackson Township meet monthly. The members included Defendants/ Respondents, W. Thomas Wilson, Michael Yoder and Ralph Weiler. The Township Secretary is Defendant, Ann I. Wirth, the Township Sewage Enforcement Office is Defendant, Barry Parks and the Building Permit Officer is Defendant, David Van Dommelen. The Township Solicitor is Larry Newton. Attorney Newton only attends the monthly Township meetings when requested by the Board of Supervisors due to fiscal constraints. (A1144-45).

In approximately 1997, the Board began discussions with regard to the development of subdivision and land development ordinance (hereinafter referred to as "SALDO"); the township citizens requested an ordinance and the Supervisors wanted more coherent planning in the Township.[3] (A571, A705). Thereafter, a two-year process ensued wherein a proposed ordinance was drafted and revised with the assistance of Richard Stahl of the Huntingdon County Planning Commission (hereinafter referred to as "HCPC"), the Pennsylvania Association of Township Supervisors and Solicitor, Larry Newton. (App. 21a; A562, A628, A646, A746, A749). The SALDO was passed at the July 10, 2000 meeting of the Jackson Township Board of Supervisors, along with privy and driveway ordinances. (A857).

In 1998, the Corneals purchased a tract of land in Jackson Township, which included an existing house and barn. (A474, A477, A484). This property previously was owned by Supervisor Wilson's grandfather. In the fall of 1999, Plaintiffs hired David Simpson to perform a survey of the property and to prepare sewage modules. (A480-81, A486-87). Corneal testified that he relied upon Simpson with respect to legal requirements. (A486). Pursuant to Simpson's advice, the Corneals contacted Defendant, Barry Parks, the Sewage Enforcement Officer of Jackson Township in order to perform tests to identify the portions of their property, if any, which were suitable for an on-lot septic system. (A480, A486-87).

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[3] Although the Corneals belatedly attack the authenticity of these letters, these documents were previously produced. See footnote 5 below.

Mr. Corneal hired Eagle Excavation to dig the sewage test pits, which is owned, in part, by Supervisor Thomas Wilson. During the time when the test pits were dug, Mr. Corneal testified that Mr. Wilson advised him that while there were no subdivision requirements in the Township, Mr. Corneal needed the SEO's approval on the sewage pit locations, which then had to be submitted to the Township. (A486). Mr. Wilson testified that at some point, he advised Mr. Corneal that if he was going to subdivide, he should do it before the year 2000 because the Township had been working on an ordinance. (A633). Mr. Parks signed the initial percolation tests. (A526). Ultimately, Parks reviewed and signed sewage modules on February 19, 2000. (A526).

In January 2000, approximately six months prior to the adoption of the SALDO, the Board imposed a moratorium on new subdivision development. (App. 7a). The Township contacted its Solicitor, Larry Newton to determine whether a moratorium on subdivisions was permissible. (A746). Attorney Newton advised the Township that he believed that the Township could impose a moratorium. (A751). Mr. Newton testified that he believed this to be true, even though there was no subdivision ordinance in effect. (A751).[4]

Mr. Simpson testified that initially Mr. Corneal expressed a desire to lay out approximately nine lots. (A847, A84). Mr. Simpson contacted the Township Secretary on or about January 25, 2000 in order to determine the date of the Township's next monthly meeting; he recalled that Ms. Wirth may have informed

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[4] Petitioners ignore the deposition testimony of Township Solicitor. Specifically, as the District Court observed, before enacting the moratorium, "... Defendant, Wirth consulted with Newton, the Township Solicitor, regarding whether the Township had the power to enact the moratorium. He indicated that the Board had such power." (App. 26a). Additionally, Petitioners failed to challenge the procedures by which the moratorium and the subdivision ordinance were adopted in the appropriate forum provided for under Pennsylvania state law. See 53 Pa. C.S. §11002-A. On this basis, Petitioners' procedural due process claim failed and is not at issue. Nonetheless, as the District Court determined, "... it is beyond dispute that the Township had been working on developing such an ordinance in conjunction with Huntingdon County officials for approximately two years before the Corneals submitted their original subdivision proposal." (App. 21a).

him that the Township was working on adopting a Township subdivision ordinance and that there was a moratorium on new subdivisions within the Township. (A849). Mr. Simpson conveyed this information to Mr. Corneal. (A849).

Mr. Simpson completed the initial subdivision plan on February 4, 2000, which provided for a three-lot subdivision. (A850). Mr. Corneal then presented the initial set of subdivision plans or sketches to the Board of Supervisors at the February 7, 2000 meeting. (A847, A855). At that time, Mr. Corneal was advised that there was a moratorium on subdivision development in the Township, and on this basis the Supervisors refused to review the Corneals' preliminary plans (App. 7a; A640, A854, A7). Two other subdivision plans unrelated to Corneal, were also held in abeyance. (A543, A857).

Mr. Corneal submitted the initial subdivision sketches to the Huntingdon County Planning Commission for review. By letter dated February 24, 2000, the Huntingdon County Planning Commission recommended denial of Plaintiffs' initial plans or sketches. (App. 8a). In the interim, on or about March 22, 2000, the Corneals submitted a second proposal for a subdivision to the HCPC. (A866). This proposal also was for a three-lot subdivision. (A866).

On April 3, 2000, at the meeting of the Township Supervisors, Mr. Corneal requested that the Supervisors sign sewage modules. (App. 8a). With respect to the sewage modules, "... the Supervisors would not sign them [the sewage modules] because we [the Board] didn't have the subdivision plan or anything." (A650). Mr. Wilson stated that the Supervisors, "... were not signing five sewer modules for one house." (A652).

Corneal stated that he informed the Board that he was no longer sub-dividing and would like to build a studio and at the same time requested a permit for a privy and a building permit on that date; the Supervisors advised Mr. Corneal that they were not issuing any building permits for a property that they believed was going to be subdivided until they had passed the SALDO. (A856). Mr. Parks told Mr. Corneal that due to conditions on his property

DEP regulations precluded use of a privy. (App. 9a). Mr. Parks told Mr. Corneal that he could not use a privy on his property at that time because the Corneals had piped water on the property and water under pressure. (App. 9a). Under DEP regulations, this precluded use of a privy. (App. 9a).

Four days after the April Township meeting where Mr. Corneal stated that he was no longer subdividing, Simpson revised Mr. Corneal's subdivision plans. The new draft, dated April 7, 2000, included only two proposed lots: one small lot with the existing house and a barn, and a second lot, which was the remainder of the property, provided for the construction of an apartment, garage and/or art studio. (App. 9a). Corneal submitted a plan dated April 7, 2000, to the Huntingdon County Planning Commission. The proposal included plans for a house and a studio on Lot 2. (A1142). By letter dated April 20, 2000, the Huntingdon County Planning Commission recommended conditional approval of the revised plan, pending adoption of the subdivision and land development ordinance by Jackson Township. (App. 9a). The Corneals never submitted this subdivision plan to the Township. (App. 5a).

On or about April 27, 2000, Mr. Corneal requested a building permit from the Township Permit Officer, David Van Dommelen. At that time, Mr. Corneal's plans apparently included an apartment and/or art studio above a garage. (A1142). Mr. Van Dommelen stated that he denied Mr. Corneal's request for a building permit because Mr. Corneal did not have proper documentation for a subdivision and sewage. (A696, A703, A706, A722). Mr. Van Dommelen did not provide the Corneals with a permit application. (A706).

Mr. Van Dommelen reiterated that even if Corneal wanted to build one structure on one piece of property, it would still be a subdivision because of the existing structure. (A704, A517-18, A519-22). Mr. Van Dommelen admitted that during Mr. Corneal's visit to Van Dommelen's home he referred to Mr. Corneal as a "trouble making yuppie from over the mountain," but testified that this was based on Mr. Van Dommelen's belief that Mr. Corneal,

"... behaves like someone who wants to get their own way and in his age group."[5] (App. 10a).

In spite of the moratorium and without any required permits, Mr. Corneal began construction on his property in the spring of 2000, including construction of his driveway. Soon thereafter, on or about June 30, 2000, Plaintiffs filed this purported civil rights action in the United States District Court for the Middle District of Pennsylvania. Mr. Corneal never availed himself of state court proceedings for an action in mandamus or an appeal of the actions of the Board of Supervisors.

In early July 2000, the Township adopted various ordinances, including the SALDO. The moratorium on subdivision development was extinguished. Plaintiffs did not seek either subdivision approval or appropriate permits for the continued construction on their property.

On July 28, 2000, Township Solicitor Newton advised the Corneals that they were in violation of the Township's building permit ordinance since they had begun construction on their property without first obtaining the requisite building permits, (A1124) and requested that they cease and desist any and all further construction until a building permit is obtained. In October 2000, the Township brought suit against the Corneals to enjoin construction. This lawsuit was settled. (App. 11a). Since the filing of the instant lawsuit on June 30, 2000 the Township has granted all permits and approvals necessary to begin development of the Corneals' tract of land. (App. 11a). By the spring of 2001, Mr. Corneal completed his construction.

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[5] Although the Corneals largely premised their argument in opposition to Defendants' Motion for Summary Judgment below on this statement, the District Court noted, in relevant part that, "while the Corneals, as the non-moving party 'are entitled to all inferences which are fairly supported by the evidence'... [they] are not permitted to build their case on mere 'opprobrious epithets' of malice... or the 'gossamer threads of whimsy speculation and conjecture.'" (App. 16a) (citations omitted).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Supreme Court Rule 10 outlines the considerations governing review on *certiorari* and provides, in relevant part, as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of *certiorari* will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; ... or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; . . .
>
> (c) ... a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A Petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Rules of the Supreme Court, Rule 10.

Although Petitioners acknowledge this Court's holding in *County of Sacramento v.* Lewis, 523 U.S. 833, 858 (1998) that the

appropriate standard for substantive due process claims, including land use cases, is that which "shocks the conscience," they argue that this Court should grant their Petition for Writ in order to determine, "what is the standard of conduct required to establish a substantive due process violation by an unhurried land use official against a property owner..." (See Petition for Writ, p. 9). *County of Sacramento v. Lewis*, 523 U.S. 833, 858 (1998); *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992); *Rochin v. California*, 342 U.S. 165, 169 (1952). The Appellate Circuits have recognized and adhered to the proper standard. The question for which Petitioners argue in support of their Writ has been settled previously by this Court and applied consistently by the Circuit Courts. *See City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 199 (2003). The District Courts and the Third Circuit below, as well as the other Circuits, have ably interpreted and applied this Court's precedent regarding the "shocks the conscience" standard in land use cases. Contrary to Petitioners' contentions, the Circuits are not in disarray or in conflict with regard to the applicable substantive due process standard of "shocks the conscience". For these reasons, Petitioners' Petition for Writ of *Certiorari* must be denied.

A. THE DISTRICT COURT AND THE THIRD CIRCUIT PROPERLY APPLIED THE APPROPRIATE RULES OF LAW ATTENDANT TO PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIM AND THERE IS, THEREFORE, NO BASIS UPON WHICH TO GRANT PETITIONERS' WRIT

Petitioners complain of what they describe as the stringent nature of the "shocks the conscience" standard. As the District Court and Third Circuit properly observed, the Supreme Court's substantive due process precedent demands that before conduct can be recognized as violating substantive due process protections, the conduct at issue must "shock the conscience."

"The touchstone of due process is protection of the individual against arbitrary action of the government." *Lewis*, 523 U.S. at 845. In a substantive due process case, "... the threshold question is whether the behavior of the governmental officer is so

egregious, so outrageous, that it may be fairly said to shock the contemporary conscience … Only if the necessary condition of egregious behavior were satisfied would there be a possibility of recognizing a substantive due process right to be free of such executive action." *Collins*, 503 U.S. at 129.

In *Lewis*, this Honorable Court emphasized, "… that conduct that 'shocked the conscience' and was so 'brutal' and 'offensive' that it did not comport with the traditional ideas of fair play and decency would violate substantive due process." *Lewis*, 523 U.S. at 847, *citing Breithaupt v. Abram*, 352 U.S. 432, 435 (1957) (internal citations omitted). This Court went on to note:

> … we have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone 'with state authority causes harm' … the 14th Amendment is not a 'font of tort law to be superimposed upon whatever systems may already be administered by the state,' … 'our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.' We have accordingly rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have held that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. It is, on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience – shocking level.

Lewis, 523 U.S. at 848-849 (citations omitted) (emphasis supplied). Clearly, substantive due process claims are limited to action, which is constitutionally significant and egregious.

This Court has consistently sought to avoid the Federal Courts becoming a local Zoning Board of Appeals. *See Village of Belle Terre v. Borras*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting). This overarching policy is consistent with this Court's delineation of the contours of substantive due process. A property owner's claim of a substantive due process violation arises only where the alleged official conduct consisits of conscience shocking behavior. There must be a demonstration of, "... conduct intended to injure in some way unjustifiable by *any government interest* [in order to evidence] the sort of official action most likely to rise to the conscience – shocking level." *Lewis*, 523 U.S. at 849 (emphasis added) (citations omitted). The District Court and the Third Circuit appropriately applied the applicable rules attendant to substantive due process claims and properly determined, that Petitioners' substantive due process claim failed where Respondents' alleged actions were not arbitrary but rather were a matter of land use policy. There is absolutely no basis upon which to grant Petitioners' Petition for Writ of *Certiorari* and, as such, it must be denied.

Contrary to Petitioners' allegations, the District Court, and the Third Circuit, properly employed the "shocks the conscience" standard. Petitioners specifically complain that the District Court and the Third Circuit somehow erred and misinterpreted the shocks the conscience standard when both Courts determined that in order to sustain a substantive due process claim in this context, Petitioners must have adduced evidence from which a reasonable jury could conclude that Respondents' action did not serve any rational land use purpose or, in other words, were "completely unrelated in any way to a rational land use goal." (App. 3A, 18A, 22A, 27A). The Lower Courts' analysis is consistent with the applicable rules of law, attendant to substantive due process, and this Court's precedent.

The substantive due process rights protect against, the exercise of power without any reasonable justification in the service of a legitimate governmental objective ..." *Lewis*, 523 U.S. at 846, *citing Daniels v. Williams*, 474 U.S. 327, 331 (1986). In other words, a substantive due process claim may lie where there is, "... conduct intended to injure in some way unjustifiable *by any government interest* ..." Id. The District Court, in its reasoned Opinion below, relied, in part, on this Court's decision in *Dolan v. City Tigard*, 512 U.S. 374, 387 (1994). This Honorable Court held that the absence of a nexus between a permit condition and a legitimate state interest converts a valid land regulation into an out-and-out plan of extortion." (See App. 18A). Petitioners ignore this Court's recent decision involving a substantive due process claim. In *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003), the City submitted to voters a facially neutral referendum petition calling for repeal of a municipal housing ordinance authorizing construction of a low-income housing complex and refused to issue building permits while the petition was pending. This Court determined that the City's engineer's refusal to issue the permits while the petition was pending, "... in no sense constituted egregious or arbitrary government conduct," and cited the decision in *Lewis*. Additionally, this Court commented as follows:

> In light of the charter's provision that 'no such ordinance [challenged by a petition] shall go into effect until approved by a majority of those voting thereon,' ... the law director's instruction to the engineer to not issue the permits represented an eminently rational directive.

Cuyahoga Fall, 538 U.S. at 199. In other words, the City officials', actions were justified in the service of a legitimate governmental objective, were rational, and were not conscience-shocking. The District Courts' application of the "shocks the conscience" standard in this case comports with this ruling.

Petitioners contend that the lower Courts' decisions are inconsistent with this Court's rulings, in that the "totality of the circumstances" was not considered, nor purportedly was there a

distinction made between hurried and unhurried conduct. (See Petition, pp. 14-15). However, a thorough analysis of the lower Courts' decisions, particularly the District Court's lengthy factual analysis, demonstrates that all of the evidence in this case was carefully considered in the light most favorable to the Petitioners. Petitioners challenge and their basis for asking this Court to grant *certiorari* is in actuality nothing more than an assertion that the Lower Court made erroneous factual findings and misapplied a properly stated rule of law.

As Petitioners point out, the District Court entertained two sets of summary judgment motions by the parties below. Further, whether an official's conduct is hurried or unhurried is but one element of the "shocks the conscience" analysis. It is not, however, its own separate test. As the *Lewis* decision advises, "...our concern with preserving the constitutional proportions of substantive due process demands *an exact analysis of the circumstances* before any abuse of power is condemned as conscience shocking." *Lewis*, 523 U.S. at 850 (emphasis added).

Petitioners did not meet their summary judgment burden of demonstrating that a material dispute of fact existed. They simply presented no evidence, which demonstrate in any way that Respondents' actions "shock the conscience." Rather, the undisputed material facts of record demonstrated that all of Respondents' actions were a matter of land use policy. The undisputed material facts demonstrated that the following actions were taken with respect to Mr. Corneal's property:

(1) Informing Mr. Corneal in February 2000 that the Board was not considering new subdivision proposals as a result of a moratorium;

(2) Refusal to sign sewer modules in April of 2000, because it would constitute subdivision approval;

(3) Refusal to issue permits in April of 2000 because subdivision approval was necessary;

(4) Filing an action with the Huntingdon County Court of Common Pleas requesting an Order requiring Corneal to cease and desist construction activities until he had complied with DEP regulations and statutes as well as local ordinances.

The record evidence thus demonstrates that there were no improper actions taken by the Township officials, which in any way improperly interfered with Petitioners' land development, let alone consisted of conscious shocking actions.

The process of drafting and adopting the subdivision and land development ordinance (hereinafter "SALDO") began two years before the Corneals sought to develop their property. (App. 21a). Petitioners presented no evidence to support their allegation that the SALDO was adopted to prevent the Corneals from developing their property. Rather, the undisputed facts demonstrated that the process of drafting and adopting the SALDO was a matter of land use planning and policy and was completely unrelated in any way to Mr. Corneal.[6] Contrary to Petitioners unsupported argument to this Court, the letter dated August 2, 1999, by Denson Groenendaal on behalf of the local citizen group predates by a approximately six months the moratorium and also predates the Corneal/Hewett contract as well as any of the subdivision plans or preparations by the Corneals. The facts of record do not support any other reasonable inference or conclusion other than that the land use planning and policy to enact the SALDO was completely unrelated in any way to Mr. Corneal.

In January 2000, Jackson Township imposed a moratorium. (App. 26a). Prior to its imposition, respondent Wirth consulted with Township Solicitor Newton regarding whether the Township had the authority to enact the moratorium; Solicitor

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[6] The Corneals belatedly attacked the authenticity of the letters authored on behalf of the local citizen group by Denson Groenendaal. However, the Corneals made voluminous copies of Township files, records, correspondence and other documents of which Respondents received a complete set of copies. These letters were included in those documents, and were produced. That Petitioners now argue in this Court that these documents should not be utilized, underscores the fact that their Petition is nothing more than an attempt to have a decision reviewed because Mr. Corneal did not like the result.

Newton advised that the Township had such power. (App. 26a). At the time the Jackson Township Board of Supervisors imposed the moratorium on new subdivisions, the Pennsylvania Courts endorsed moratoriums. *See Naylor v. Township of Hellum*, 717 A.2d 629, 633 (Pa. Cmwlth. 1998), reversed 565 Pa. 397, 773 A.2d 770 (2001). All of Respondents' subsequent actions must be viewed in this context; Respondents believed that they had properly enacted a moratorium, which they had a right to enforce, as they revised and prepared to adopt the SALDO. The moratorium was in effect one month before Corneals' first proposed subdivision was even drafted. (App. 26a). The undisputed material facts clearly demonstrate that the moratorium was not imposed in order to prevent the Corneals from developing their property. The facts of record do not support any other reasonable inference or conclusion.

The District Court considered whether the enactment of the moratorium in January 2000 could shock the conscience. (App. 25a-26a). Tellingly, Petitioners failed to challenge the procedures by which the moratorium or the SALDO were adopted in State Court. They did not seek review of any of the Township's action via an appeal or mandamus action to the Common Pleas Court of Huntingdon County, PA. See 53 Pa. C.S. §11002-A. The District Court and the Third Circuit specifically addressed the Petitioners' argument below that the Board "did not have power to enact the moratorium." (App. 25a-26a). The District Court determined, in part, that, "... even if the Board lacked the authority to enact the moratorium and may not have followed the proper procedure for enacting, these facts will not insulate the Corneals' claim from summary judgment. It is further noted that even if Solicitor Newton's conclusion appears to have been wrong with regard to the Supervisor's ability to enact a moratorium, "... an error of state law does not amount to an actionable claim for violation of substantive due process." *See Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102, 1105 (8th Cir. 1992) ("a bad faith violation of state law remains only a violation of state law.") (App. 25a-26a).

Both the District Court, and the Third Circuit made these determinations only after considering and addressing other

purported "undisputed bad acts" of the Respondents. The District Court fully recounted the facts of record and considered them, as it repeatedly stated, in the light most favorable to the Corneals. (App. 6a, 15a, 16a, 22a, 24a). The District Court's thorough recitation of the facts addressed and acknowledged the actions of each of the Respondents, including the sewage and permit officers.[7] The Court concluded in relevant part as follows:

> Although the Corneals point to a litany of other decisions relating to the issuance of building permits and sewage modules, those decisions are properly viewed as extensions of the Board's initial decision to hold all subdividing in the Township until the Board could enact a comprehensive land use ordinance. (App 21a-22a).

The undisputed material facts of record demonstrate that there were no improper actions taken by the Township officials which could be characterized as so egregious or arbitrary as to be conscience shocking in the constitutional sense. In summary, the record evidence fails to demonstrate that Defendants' actions were "conscience shocking," such that Plaintiffs can demonstrate a claim for a substantive due process violation. The Supervisors, Township Secretary and the Municipal Ordinance Officers did not act arbitrarily, but rather their actions were always a matter of land use policy. There is no evidence in this case that the Township engaged in delay tactics for the purpose of refusing to issue permits. *See PVZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 32

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[7] While Petitioners contend that the District Court did not consider the alleged "undisputed bad acts", of the Respondents, the District Court specifically addressed Mr. Van Dommelen's actions in footnote 8 of its decision. The District Court concluded that "... while other applicants sought similar permits, no other permit applicant was similarly situated. Unlike the other applicants for building permits during the pendency during the moratorium, the Corneals needed to subdivide their property to be eligible for the building permits they sought due to the existing dwelling on their property." (App. 21a). Indeed, the Court further concluded that the Corneals did not present any evidence that other developers or landowners were granted subdivision approval or that the Corneals were subject to more owners' conditions as other similarly situated permit applicants. (App. 25a).

(1st Cir. 1991). For instance, DEP, by way of the Sewage Facilities Act, requires review and approval of proposed subdivisions regardless of local regulation. (See 35 P.S. §§750.2 and 750.7). In this regard then, the Township's insistence on proper sewage tests, modules and permits was not capricious or "conscience shocking," but rather was mandated by DEP standard and regulations. Like the cases relied upon by the Third Circuit in the *Warrington* decision itself, there is no evidence that the Township "knowingly enforced the invalid zoning ordinance in bad faith ..." *See City of Chesterfield*, 963 F.2d at 1104-05. Rather, as outlined above, the Township had enacted a temporary moratorium and was in the process of drafting and approving a subdivision and land development ordinance. No other subdivisions were approved during this period and others were held in abeyance similar to Mr. Corneal's. Simply, these land use decisions were a matter of local concern and do not rise to the level nor can they be transformed into substantive due process claims based on Petitioners' allegations. On this basis, the District Court's and the Third Circuit's decisions provide absolutely no basis upon which to grant the instant Petition for Writ of *Certiorari* and, as such, it must be denied.

B. THE THIRD CIRCUIT'S DECISION IS NOT IN CONFLICT WITH OTHER CIRCUITS ON THIS MATTER, NOR ARE THE CIRCUITS GENERALLY IN CONFLICT WITH REGARD TO THE SHOCKS THE CONSCIENCE STANDARD

The Third Circuit's decision below is not in conflict with this Court's precedent or other Circuits on this matter. The Circuits are consistent with regard to their interpretation and application of the shocks the conscience standard in land use cases. Petitioners' complain that the Lower Courts have inconsistently defined the contours of the shocks the conscience standard for property rights and, further complain that the adopted tests are stringent. However, by its very nature, substantive due process represents the outer limits of tort liability and its threshold is inherently stringent.

As set forth above, the Third Circuit specifically adopted this Court's shocks the conscience standard in land use cases, the case of *United Artists Theatre Circuit, Inc. v. Township of Warrington*, Pa., 316 F.3d 392 (3d Cir. 2003). Petitioners complain that the Third Circuit therein adopted an "all-or-nothing" approach. (See Petition for Writ, p. 18). Specifically, Petitioners object to the *United Artists* decision, ruling that, "... unless the Defendants' actions were 'completely unrelated in any way to a rational land use goal,' there is no violation" of substantive due process. (See Petition for Writ, p. 18; App. 3A). The District Court and the Third Circuit's Opinions in this matter relied upon and properly applied the *United Artists* decision. In turn, that case, as well as the Third Circuit's Opinion in this matter relied upon *Lewis*. In *Lewis*, this Honorable Court determined that unless the Respondents' actions were "completely unrelated in any way to a rational land use goal," there is no substantive due process violation. *See Lewis*, 523 U.S. at 846. In other words, where the official action at issue is related in some way to a legitimate or rational land use goal, that official's conduct necessarily cannot permeate the shocks the conscience threshold. The Third Circuit's decision in this matter is not contrary to that of other Circuits, nor, more importantly, is it contrary to Supreme Court precedent. Petitioners have not demonstrated otherwise.

Petitioners further complain that, "... other Circuits have adopted stringent tests, which achieve similar end results ... but each utilizes different language to define the contours." While each Circuit may utilize different language, as Petitioners contend, to define the contours of the shocks the conscience standard, their interpretation of the shocks the conscience standard is not inconsistent. As such, there is no basis to grant Petitioners' Petition for Writ of *Certiorari*. See Rules of Supreme Court, Rule 10.

In the First Circuit, in order to establish a substantive due process claim, a Plaintiff must demonstrate an, "... abuse of government power that shocks the conscience" or "action that is legally irrational and that it is not sufficiently keyed to any legitimate state interest." *See Collins v. Nuzzo*, 244 F.3d 246, 250 (1st Cir. 2001), *citing*, *Rodriguez*, 928 F.2d at 31-32. In *Collins*, an

applicant was denied a new annual license to operate his used car lot. The applicant sued the City alleging, among other things, a *substantive due process* violation. The First Circuit determined that the applicant failed to demonstrate that the denial of his license constituted a conscience shocking abuse of governmental power, where there was a four-year history of license violations and despite the fact that the applicant had a contentious relationship with a City alderman. *Collins*, 244 F.3d at 251. In *PVZ Properties, Inc.*, a developer brought a civil rights action against a Puerto Rican agency and its former administrator following the agency's rejection of construction permits. The First Circuit determined that even assuming that the agency engaged in delay tactics and refused to issue permits for the developer's project, based on considerations outside the scope of its jurisdiction, "... such practices, without more, do not rise to the level of violations of the Federal Constitution under a substantive due process label." *Rodriguez*, 928 F.2d at 32. As the Third Circuit observed, "... land use decisions are matters of local concern, and such should not be transformed into substantive due process claims based only on allegations that government officials acted with 'improper' motives." *Warrington*, 316 F.3d at 402. In this regard, the First Circuit made the following relevant observation:

> Every appeal by a disappointed developer from an adverse ruling of the local planning board involves some claim of abuse of legal authority, but '[i]t' is not enough simply to give those state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question under §1983.

Warrington, 316 F.3d at 402, *citing Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982). Based on the foregoing, the First Circuit has recognized the "shocks the conscience" standard and has interpreted it similarly to that of the Third Circuit requiring that a Plaintiff demonstrate that a government action is either legally irrational, or "not sufficiently keyed to any legitimate state interest" in order to sustain a substantive due process claim.

The Second Circuit similarly has relied on this Honorable Court's decision in *Sacramento v. Lewis* in determining that, "... substantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority." *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2nd Cir. 1999), *citing* Lewis, 523 U.S. at 846. In subsequent Second Circuit decisions, the Second Circuit has denied substantive due process claims and determined that they were not so "outrageously arbitrary as to constitute a gross abuse of governmental authority," where there was a legitimate basis for the municipal action. In *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12 (2nd Cir. 1999), a shopping mall tenant brought an action against the town alleging Lanham Act and civil rights violations for the town's purported denial of the tenant's request for a sign permit variance. The Second Circuit affirmed the District Court's determination that the town had a "legitimate reason for its decision to deprive Lisa's Party City of its interest in erecting a sign that was fully consistent with its federally registered trademark ... [where] the town's ordinance properly takes into account aesthetic concerns in limiting the range of colors available for exterior signs." *Lisa's Party City*, 185 F.3d at 17. As the Second Circuit determined, since the town acted in accordance with a legitimate concern, it did not act in an outrageously arbitrary manner so as to violate Lisa's Party City's substantive due process rights. In *Harlen Associates v. Incorporated Village of Mineola*, 273 F.3d 494 (2nd Cir. 2001), a property owner sued the Village Zoning Board pursuant to §1983, where his application for a special use permit allowing him to operate a convenience store had been denied. The Second Circuit determined that the Village Zoning Board had a legitimate interest, which could rationally be furthered through the denial of the property owner's application. *Harlen*, 273 F.3d at 505. On this basis, the Second Circuit determined that the Board's actions did not "transgress the 'outer limit' of legitimate government action, therefore, they did not give rise to a federal substantive due process claim." Id. Hence, the Second Circuit has similarly interpreted the "shocks the conscience" standard with regard to its use in property and land use cases.

In the Fourth Circuit, in order to state a valid substantive due process claim, a Plaintiff of course, must demonstrate a protectible property interest, which has been deprived by the State and further, demonstrate that, "... the State's action falls so far below the outer limits of legitimate governmental action that no process could cure the deficiency." *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 440 (4th Cir. 2002). In *Tri-County*, the County denied a building permit for a proposed asphalt plant and subsequently adopted a moratorium on asphalt plants and enacted a polluting industry development ordinance, which restricted the operation of asphalt plants. The Fourth Circuit denied the Plaintiff, paving contractor's substantive due process claim and determined that the County's actions, "... clearly did not fall beyond the outer limits of legitimate governmental action." *Tri-County*, 281 F.3d at 440. To the contrary, the Court determined that the County's actions were rationally related to a legitimate government purpose including, in part, protecting health, safety, general welfare and property values of the County's citizens. Based on the foregoing, the Fourth Circuit has not inconsistently defined the contours of the shocks the conscience standard in property cases.

In the Fifth Circuit, the Court of Appeals has adopted the "shocks the conscience" standard in reviewing substantive due process challenges to executive action, and examines, "whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Conroe Creosoting Company v. Montgomery County, Texas*, 249 F.3d 337, 341 (5th Cir. 2001), *citing Lewis*, 523 U.S. at 842.

In the Eighth Circuit, in *Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068, 1071 (8th Cir. 1997), the Plaintiff, BMI challenged a decision by the County Commissioners to impose restrictions on BMI's permit to locate a temporary asphalt pit in Rice County. Although BMI presented evidence that the Board was motivated by personal animus against BMI's Permit Officer, the District Court granted summary judgment in favor of the County. On appeal, the Eighth Circuit upheld the decision and stated that, "... the Board had rational bases upon which to restrict

BMI's permit." *Rice County*, 126 F.3d at 1070. Relying on *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992), the Eighth Circuit reiterated that allegations of personal animus alone are insufficient to survive a summary judgment motion on a substantive due process challenge to a land use decision. (App. 22a).

The foregoing demonstrates the Circuits have consistently, rather than inconsistently, defined and addressed the contours of the shocks the conscience standard in land use cases. There is absolutely no evidence that the Circuits are ignoring the dictates of this Honorable Court with regard to considering the totality of the circumstances, contrary to Petitioners contention. While Petitioners argue that the instant standard effectively forecloses this remedy in land use cases, such is not the case where the government conduct pierces the shocks the conscience threshold. In this regard, the District Court stated:

> ...a substantive due process claim under the "shocks the conscience" test will survive summary judgment only if the plaintiff can present evidence from which a jury could conclude that the locality's decision was not rationally related to a legitimate land use goal. As a result, the plaintiff must demonstrate that the land use decision or regulation was so totally irrational that it could not possibly be the real reason for the locality's action or, alternatively, that the locality applied its decision selectively so that its land use concern could not have been legitimate despite the rational basis for it.

(App. 24a). Hence, contrary to Petitioners contention, particularly in the Third Circuit, a property owner's case is not foreclosed upon a showing as outlined by the District Court. In this case, which Petitioners ignore, they offered no evidence of purported disparate treatment or "pretext." (App.25a) Again, while Petitioners object to the stringent nature of the threshold "shocks the conscience, " such is not without reason as stated by the lower court:

> While this is obviously an onerous burden to plaintiffs, the reason for it is not without logical support. As the First Circuit stated: Substantive due process, as a theory of constitutional redress, has in the past fifty years been disfavored, in part because of its virtually standardless reach. To apply it to claims like the present would be to insinuate the oversight and discretion of federal judges into areas traditionally reserved for state and local tribunals. Clearly, it is no simple matter to decide what abuses to regard as abuses of "substantive" due process. Every litigant is likely to regard his own case as involving such an injustice. Thus, we have consistently held that the due process clause may not ordinarily be used to involve federal courts in the rights and wrongs of local planning disputes. In the vast majority of instances, local and state agencies and courts are closer to the situation and better equipped to provide relief. We have left the door slightly ajar for federal relief in truly horrendous situations. But, this circuit's precedent makes clear that the threshold for establishing the requisite "abuse of government power" is a high one indeed. *Nestor Colon Medina & Sucesores,* 964 F.2d at 45.

(App.24a). Based on the lack of any conflict or inconsistency amongst the Circuits, there is no basis upon which to grant the Petition for Writ. As such, it must be denied.

C. THE THIRD CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT REGARDING THE ROLE OF THE COURT AND THE JURY

Petitioners contend that the Third Circuit's disposition conflicts with the decisions of this Court as follows:

> Concerning the role of courts and juries in weighing the evidence and making credibility determinations for the purpose of addressing whether a stated goal is legitimate or rational or a pretext contrived to justify the official's conduct; whether the official's actions were in furtherance of and rationally related to the stated goal; and, ultimately, whether the totality of the actions rises to the level of arbitrary and irrational conduct so as to constitute a substantive due process violation.

(See Petition for Writ, p. 23). However, Petitioners misapprehend the role of the Court in this matter. As this Honorable Court has stated, in any action under §1983, "... the first step is to identify the exact contours of the underlying right said to have been violated." *Lewis*, 523 U.S. at 842, n. 5, *citing Graham v. Connor*, 490 U.S. 386, 394 (1989). The question of whether a Plaintiff has asserted a violation of a constitutional right at all is purely a question of law. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991); *Conn v. Gabbert*, 526 U.S. 286, 290 (1999). In other words, it is for the Court to determine whether the Corneals' claim constitutes a substantive due process violation under the applicable standard in the first instance.

Based on the Lower Courts' rulings, the Courts, as a matter of law, properly determined that the Corneals' claim did not constitute a substantive due process violation under the "shocks the conscience" test. (App. 25a). As the District Court repeatedly stated, in order to survive summary judgment under the "shocks the conscience" test, "... the Corneals must have adduced evidence from which a reasonable jury could conclude that the Board's actions did not serve any rational land use purpose." (App. 18a, 20a, 24a, 27a). The District Court further stated, in relevant part:

> As a result, unless the evidence indicates that the challenge is completely unrelated in any way to a rational land use goal, there is no violation of substantive due process. The corollary of that rule being that where the locality's decision is

> related in any way to some rational goal, then no due process violation occurs even if the locality may have exceeded the scope of its jurisdiction.

(App. 19a). The Third Circuit, in affirming the District Court's Order, stated that, "... unless the Defendants' actions were 'completely unrelated in any way to a rational land use goal,' there is no violation." (App. 3a). The Third Circuit further commented, in relevant part, as follows:

> Although some conduct may evidence personal animus – such as calling Mr. Corneal 'that trouble-making yuppie from over the mountain' – under *United Artists*, mere improper motives are not conscious-shocking. *See United Artists Theatre Circuit, Inc. v. Township of Warrington, Pa.*, 316 F.3d at 400-01. (Court's Footnote omitted).[8]

(App. 3a).

Based on the foregoing, the District Court and the Third Circuit's analyses and opinions comport with the decisions of this

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[8] Petitioners' argument that the jury should have considered purported evidence of improper motive is irrelevant. As demonstrated by the District Courts and Third Circuit Court's Opinions, mere improper motive or purported illegitimate personal animus, even if substantiated, is not enough to establish a violation of substantive due process, which, again, is the threshold legal determination made by the Court. In any regard, as the District Court and Third Circuit determined, the Corneals failed to adduce evidence from which a reasonable jury could conclude that Defendants' rational land use concern was a mere pretext. (App. 25a). Both Courts determined that the Petitioners claim that Defendant, Wilson acted with personal malice was unsubstantiated and essentially constituted mere speculation. (App. 3a). Additionally, the District Court criticized the Petitioners' reliance, as evidence of personal animus, on Defendant, Van Dommelen's alleged statement that Mr. Corneal was a "troublemaking yuppie from over the mountain." (App. 16a). Further, Petitioners failed to offer any evidence with regard to disparate treatment. As the Courts properly determined, purported evidence of mere improper motives is insufficient to implicate Petitioners' substantive due process rights, and, also, the record evidence, as viewed in the light most favorable to Petitioners, failed to demonstrate any real personal animus. On these additional bases, Petitioners' Petition for Writ of Certiorari must be denied.

Court concerning the role of the Court and the jury. The Courts were obligated to define the contours of that which may have implicated a substantive due process violation under the applicable standard of "shocks the conscience." The evidence, as adduced by Petitioners, failed to implicate any substantive due process right. On these bases, the District Court, and the Third Circuit Courts' Opinions were not in error, nor were they in conflict with this Court's dictates concerning the role of the Court and the jury. Accordingly, Petitioners' Petition for Writ of *Certiorari* must be denied.

CONCLUSION

Based on the foregoing, Respondents, Jackson Township, W. Thomas Wilson, Michael Yoder, Ralph Weiler, Barry Parks, David Van Dommelen and Ann I. Wirth respectfully request that this Honorable Court deny Petitioners' Writ of *Certiorari*.

Respectfully submitted,

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No. 04-63

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IN THE

Supreme Court of the United States

DAVID B. CORNEAL AND SANDRA Y. CORNEAL,
Petitioners

V.

JACKSON TOWNSHIP, HUNTINGDON COUNTY, PENNSYLVANIA, ET AL.,
Respondents

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Third Circuit

PETITIONERS' REPLY MEMORANDUM

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I. INTRODUCTION.

The Respondents, in their opposing brief,[1] have attempted to recharacterize the Petitioners' claims as a simple, local land use dispute not worthy of constitutional protection and, in the course of their brief, misconstrued the holding of *Sacramento v. Lewis* and the Court's recent opinion in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*. Respondents, through their pleadings and their opposition, have attempted to minimize their illegal actions as "land use policy" when, in fact, their actions in denying Petitioners the use and enjoyment of their property raise far-reaching questions of federal constitutional law and substantive due process that never have been addressed by this Court.

II. LEGAL ANALYSIS.

A. Respondents Misconstrue the Holdings in *County of Sacramento v. Lewis* and in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation.*

Respondents assert in their Brief in Opposition to Certiorari that this Court's decisions in *County of Sacramento v. Lewis*, 523 U.S. 833 (1988), and *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003), support the Third Circuit's holding below that where a municipal official's decision is related in any way to a rational land use goal there can be no due process violation. Respondents' arguments are based,

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[1] Respondents Jackson Township, W. Thomas Wilson, Michael Yoder, Ralph Weiler, David Van Dommelen, Barry Parks and Ann Wirth submitted a Brief in Opposition to Certiorari. Respondent Larry Newton, apparently, has elected not to file a Brief in Opposition to Certiorari.

however, on an incorrect reading of *Sacramento v. Lewis* and an apparent misunderstanding of the materially distinguishable facts of *Cuyahoga Falls*.

As more fully set forth in Petitioners' main brief, the Third Circuit's holding is not a natural outgrowth of this Court's holding in *Sacramento v. Lewis*. Indeed, the Third Circuit's and the District Court's analysis disregards the critical "totality of the circumstances" test required by *Sacramento v. Lewis*. *See* 523 U.S. at 846-47 and 850; Pet. for Cert. at 12-14. The Court in *Sacramento v. Lewis* clearly stated:

> Rules of due process are not [...] subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking. ... Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

Sacramento v. Lewis at 850 (quoting *Betts v. Brady*, 316 U.S. 455, 462 (1942)).

Notwithstanding this clear directive, the Third Circuit and the District Court did not apply the "totality" of the circumstances analysis, but instead applied a wholly

unrelated (and brand new) rule of law: "unless the defendants' actions were '*completely unrelated in any way to a rational land use goal*,' there is no violation" of substantive due process. (App. 3a) (emphasis added). In other words, the Third Circuit's analysis is that, regardless of any other evidence to the contrary, where the municipal official articulates any facially rational basis for his actions, there can be no violation of substantive due process. This result is plainly contrary to the rule of *Sacramento v. Lewis*, and the entire jurisprudence of this Court, that the courts must consider and evaluate differently those situations in which executive officials have the luxury of time to make unhurried judgments uncomplicated by the demands of competing obligations (for example, land development applications), and that in those situations, deliberate indifference of the state actor can rise to the level of conscience-shocking behavior. *See Sacramento v. Lewis* at 852-53.[2]

Respondents also assert that this Court's decision last term in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003), somehow validates the Respondents' arbitrary denial of the Petitioners' right to use and enjoy their property. In *Cuyahoga Falls*, a nonprofit corporation sought to develop a low-income housing development. The development met with substantial public opposition that appeared to be based, at least in part, on racial discrimination. The city council approved the development plans in spite of the opposition, but then refused to issue

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[2] Respondents make the curious assertion that, "In *Lewis*, this Honorable Court determined that unless the Respondents' actions were 'completely unrelated in any way to a rational land use goal,' there is no substantive due process violation. *See Lewis*, 523 U.S. at 846." (Resps.' Br. Opp. Cert. at 17). Of course, this Court made no such determination in *Sacramento v. Lewis*, and Respondents' accompanying conclusion that the lower courts' decisions, therefore, are not inconsistent with *Sacramento v. Lewis* is misguided.

building permits because the opponents to the development filed a petition requiring the development approval to be submitted to public referendum under the city charter. *See Cuyahoga Falls*, 538 U.S. at 191-92. The city charter further provided that an ordinance challenged by petition shall not go into effect until approved by the voters. *Id.* at 192.

Buckeye filed suit, asserting violation of the Equal Protection Clause, the Due Process Clause, and the Fair Housing Act. This Court, in addressing the matter, concluded that Buckeye failed to state either an Equal Protection[3] or Due Process Claim. As to the Due Process portion of the analysis, the Court concluded that the city's decision not to issue the permits after the referendum petition had been filed could not rise to the level of arbitrary conduct because the city charter specifically directed that an ordinance challenged by petition shall not go into effect until approved by a majority of voters. *Id.* at 198-99. In other words, there was no due process violation because it cannot be an arbitrary act to do that which is prescribed by an otherwise valid law.

By contrast, the actions taken by the Respondents in this case clearly were *not authorized* by law. Respondents imposed a moratorium on all subdivisions and land development (in anticipation of Petitioners' forthcoming application for subdivision approval) despite the absence of any subdivision or land development ordinance – an absolute

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[3] The bulk of the Court's opinion in *Cuyahoga Falls* is dedicated to analysis of the equal protection claim. Petitioners here have not pleaded claims arising under the Equal Protection Clause, and that analysis is largely immaterial to Petitioners' claims. Respondents, on the other hand, continue to confuse the equal protection standards with due process standards, repeatedly emphasizing that Petitioners were not subject to disparate treatment by Respondents. (*See* Resps.' Br. Opp. Cert. at 15 n.7 and 21).

prerequisite for any land regulation – and despite the fact that there is no authority in Pennsylvania law for the imposition of moratoria in the first instance. (App. 26a n.10). Moreover, the Record makes abundantly clear that many of the actions of the Respondents were taken in bad faith and for reasons of personal animus.[4] Thus, while the proper determination of the substantive due process claim in *Cuyahoga Falls* appears to be quite simply reached, the facts in this case are so distinguishable as to make Respondents' reliance thereon unpersuasive, and require this Court's guidance for the proper application of the shocks the conscience standard to property rights cases.

B. Respondents' Have Continued to Mischaracterize and Denigrate the Nature of the Petitioners' Claims.

Throughout this entire litigation, Respondents have mischaracterized the nature and basis of the Petitioners' claims in their efforts to avoid constitutional review of their deprivation of the Petitioners' right to use and enjoy their property. Respondents continually characterize Petitioners' claims as an ordinary "land use dispute," attempting to draw parallels between this case and cases involving purely local matters such as zoning variances, rights of way, and similar issues of local concern. This case, however, presents much more significant issues that do, in fact, rise to the level of federal constitutional concern. In a nutshell, this case presents the question of whether local municipal officials can abuse their official positions to prevent land development for no reason other than the fact that they do not like the property owner and do not want him as a neighbor. As even the First

[4] Petitioners will not repeat here the long list of undisputed facts relating to the Respondents acts, but refer the Court to pages three through five of their Petition for Writ of Certiorari.

Circuit stated: "We have thus observed a marked difference between the inevitable misjudgments, wrong-headedness, and mistakes of local government bureaucracies and the utterly unjustified, malignant, and extreme actions of those who would be parochial potentates." *Baker v. Coxe*, 230 F.3d 470, 474 (1st Cir. 2000).[5]

The Respondents mischaracterization of the Petitioners' claims goes much further than even the mild disparagement noted above. Respondents go so far as to declare boldly that "Petitioners presented no evidence to support their allegation that the SALDO [subdivision and land development ordinance] was adopted to prevent the Corneals from developing their property" and, therefore, summary judgment was proper. (Resps.' Br. Opp. Cert. at 13). The pleadings and papers filed in this case affirm the Respondents' brave assertion – the Petitioners never challenged the right of the Township to impose an effective, lawfully enacted subdivision ordinance, nor could they. Rather, Petitioners challenged the numerous unlawful acts undertaken by the Respondents *in the absence of a valid subdivision ordinance* and for the sole purpose of interfering with the Petitioners' right to use and enjoy their property, and Respondents' semantics cannot undermine the constitutional significance of Petitioners' claims.

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[5] Notwithstanding this observation, the First Circuit rejected the plaintiffs' substantive due process claims in *Baker v. Coxe*, thus maintaining its policy of rejecting all substantive due process claims in land use cases. *See Macone v. Town of Wakefield*, 277 F.3d 1, 9 (1st Cir. 2002) ("We have consistently rejected substantive due process claims arising out of disputes between developers and land planning authorities....").

C. Respondents' Brief Emphasizes the Need for Guidance from This Court in Applying Substantive Due Process Standards to Land Use Cases.

Respondents argue in their opposition brief that there is no inconsistency among the Circuits in their application of the "shocks the conscience" standard in substantive due process cases involving land use. In support, Respondents recite the holdings of the same cases discussed by Petitioners in Part B of the Petition (Pet. for Cert. at 17-23). Respondents differ only in their conclusion: Respondents assert that, although each court describes the standard differently, the application is uniform – rejection of substantive due process protection of property interests – and, therefore, there is no issue for resolution by this Court.

Respondents' conclusion, however, demonstrates the precise reason that guidance by the Court is necessary. The Circuit Courts all have expressed their policy-based reluctance to allow landowners to seek redress for deprivation of property rights through substantive due process. *See, e.g.*, *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 402 (3d Cir. 2003) ("application of the 'shocks the conscience' standard in this context also prevents us from being cast in the role of a 'zoning board of appeals.'"); *Creative Env'ts, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982) (same). Certainly, sound policy requires that run-of-the-mill zoning appeals should not be permitted to be re-cast as substantive due process claims, but the Circuit Courts' tenacious adherence to a blanket policy of excluding real property rights from substantive due process protection is contrary to

the text and spirit of the Fourteenth Amendment[6] and to the very foundations of our Nation.

Guidance from this Court, therefore, is critical to define the proper application of the "shocks the conscience" standard to those cases which implicate the protections of the Fourteenth Amendment from arbitrary acts of local government officials in relation to a landowner's right to use and enjoy his or her property. In the absence of such guidance, the Circuit Courts will continue to utilize the current inconsistent formulations and analyses to justify an overbroad, policy-based exclusion of property rights from substantive due process protection.

D. Respondents' Misapprehend the Distinction Between the Legal Definition of a Constitutional Right and the Factual Determination of a Violation Thereof.

Respondents argue that the Third Circuit's opinion is in accord with this Court's decisions relating to the role of the jury in substantive due process cases because the question of whether a plaintiff has asserted a violation of a constitutional right is a question of law and, therefore, "it is for the Court to determine whether the Corneals' claim constitutes a substantive due process violation under the applicable standard in the first instance." (Resps.' Br. in Opp. Cert. at 23). Respondents' synopsis of the lower courts' analysis is accurate, and demonstrates again why review by this Court is necessary: if this Court were to accept Respondents' formulation, then there would be no role for the jury to play in any substantive due process claim, because judge already would have made a binding

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[6] "No State shall ... deprive any person of life, liberty, or property, without due process of law". U.S. Const., amend. XIV, § 1.

determination *before any genuinely disputed facts are weighed by a jury* that (1) a fundamental right is implicated, (2) that the defendant, acting under color of state law, violated that right, and (3) that the defendant's conduct rises to the level of shocking to the contemporary conscience.

Respondents' recitation of the Third Circuit's formulation of the role of the jury in substantive due process cases is plainly at odds with the decisions of this Court. It is beyond dispute that questions of fact must be determined by the fact-finder, i.e., the jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). This Court further has held that the question of whether the contested government action substantially advances a legitimate governmental interest is a mixed question of law and fact, and, in context, the questions of "advancement" the ultimate question of intent, are undeniably for the jury. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721 (1999). Thus, the question of the existence of a legitimate governmental interest is for the jury, and it is only after a finding of a legitimate government interest that the court should make the legal determination of whether the actions of the governmental actor are rationally related to that legitimate goal. *See id.*; *see also Matthews v. Lucas*, 427 U.S. 495, 510 (1976) (court should submit to the jury question of whether asserted state interest is rationally related to the complained of actions or is mere pretext); *Estate of Smith v. Marasco*, 318 F.3d 497, 510 (3d Cir. 2003) (court's conclusion that element of due process claim could not be proven because officers used legitimate tactics usurps the role of the jury where plaintiff presented evidence disputing officers' motives and tactics).

Here, the Petitioners presented the District Court with substantial evidence raising issues of the motivation, intent and credibility of the Respondents, and the District Court

expressly acknowledged that it could not determine from the facts of record "whether the Defendants blocked the Corneals' land development plans as a matter of land use policy or because they simply did not like Mr. Corneal and wanted to keep such a 'trouble making yuppie' from erecting a home in the Township." (App. 51a). Nevertheless, on the renewed motion for summary judgment, the District Court adopted the approach enunciated by the Respondents in their Brief in Opposition, made its own determinations as to the credibility of the Respondents and whether the Respondents' undisputed acts (and disputed acts) were motivated by rational land use concerns and whether those acts could "shock the contemporary conscience." This is clearly a usurpation of the role of the jury, and the Third Circuit's sanction of that procedure is manifestly violative of this Court's holdings in *Del Monte Dunes* and *Matthews v. Lucas*. Accordingly, the Court should grant Certiorari to clarify the role of the jury in deciding substantive due process cases.

III. CONCLUSION

The Court should issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully Submitted,

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